APPEAL NO. 001638

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 22, 2000. With regard to the only issue before him, the hearing officer determined that the deceased employee had not sustained a compensable injury on _____, that resulted in her death.

Claimant/beneficiary appealed, contending that the personal comfort doctrine enunciated in Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985), was applicable and that the decedent was performing her duties at the time of her death. Claimant/beneficiary requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (self-insured) responds, citing a very similar Appeals Panel decision and a court case to support its position, and urges affirmance.

DECISION

Reversed and rendered.

The background facts are not in dispute and the hearing officer's recitation as follows sets out the pertinent facts:

> [Decedent] was a school bus monitor for the self-insured employer, and was required to report to work each school day at 6:00 a.m. She was a diabetic, and took an oral medication that required her to eat soon thereafter. It was her custom to check in to work, then eat on the school bus while the driver was completing his inspection.

The undisputed evidence was that as the bus driver was conducting his inspection and the decedent was eating on the bus, the decedent choked on a piece of food (variously described as a burrito, ham sandwich, etc.). The decedent staggered off the bus vomiting; emergency medical services was called; the decedent was transported to a nearby hospital where her airway was opened, but she had already sustained brain damage; and decedent was placed on life support. Two or three days later, when the life support system was removed, the decedent died. The death certificate listed the cause of death as "upper airway obstruction secondary to food aspiration," with a secondary cause of death as "anoxic encephalopathy." There was some evidence that the decedent may have been ill with the flu prior to starting work on _____, but that does not appear to have any relevance to the case.

The hearing officer, in his discussion, commented:

> Not every injury that occurs at the employer's place of business is compensable. The employee must be in the course and scope of his or her employment, and the injury must be of a type or character that arises out of the employment. Under the personal comfort doctrine, Deceased did not

> step out of the course and scope of employment by eating a burrito while she was on the school bus. The second part of the test is more difficult to meet.

The hearing officer comments that the Appeals Panel has considered a number of cases which have analyzed the personal comfort doctrine, including a case where the employee was required to eat and sleep at the job site; the Yeldell, *supra*, cases which have "involved some instrumentality of the employee, such as a coffee pot"; and a case involving a bee sting which caused the death of a worker. The hearing officer goes on to recite:

> The question under the second prong of the test is "whether the injury would have occurred if the conditions and obligations of employment had not placed the claimant in harm's way." Employer's Casualty Co. v. Bratcher, 823 S.W.2d 719, at 721 (Tex. App.-El Paso 1992, writ denied).
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> Using the Bratcher analysis, it becomes clear that [decedent's] injury was not compensable. She was not required to eat her breakfast at work; and, the injury resulted from the breakfast itself, not some item or element provided by the employer or inherent in the workplace. Nothing about the employment situation made her choking more likely.

The claimant/beneficiary appeals, relying on Yeldell, *supra*, a case where a nursing home charge nurse was sitting at her duty station on her regular shift when she called her daughter. As she hung up the telephone, the cord became entangled in a coffee urn that overturned, spilling hot coffee on her, resulting in second and third degree burns. The court held that the trial court did not err in holding that, as a matter of law, Yeldell was within the course and scope of her employment. Specifically, the court held that "[a]n 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 went on to say that the 1989 Act should be liberally construed in favor of the employee and that it should not be hedged about with strict construction, but should be given a liberal construction to carry out its evident purpose. Texas Workers' Compensation Commission Appeal No. 951583, decided November 9, 1995, and Texas Workers' Compensation Commission Appeal No. 961113, decided July 25, 1996, give fairly comprehensive discussions of personal comfort cases.

The self-insured cites Bratcher, *supra*, and Deatherage v. International Insurance Co., 615 S.W.2d 181 (Tex. 1981), for the proposition that an injured employee must meet two requirements for compensability: the injury must have occurred while the employee was engaged in the furtherance of the employer's affairs, and the employee must show that the injury was of a kind and character that had to do with the employer's work, trade, business, or profession (it is this rationale that the hearing officer adopted). The self-insured also quite correctly points out that the most similar Appeals Panel decision on this principal is Texas Workers' Compensation Commission Appeal No. 962128, decided

December 5, 1996, a case where an office worker broke a tooth while eating hard candy at work. The hearing officer found that injury compensable and the Appeals Panel reversed and rendered a new decision holding that the worker would have faced the same risk "irrespective of his employment," applying Bratcher, *supra*. The self-insured contends that the instant case requires the same analysis, that the decedent was not at any increased risk of choking due to her employment because she was sitting in a non-moving bus "doing nothing but eating a burrito at the time," and that her employment in no way caused her injury. We agree that this case presents an extremely close question of law and that the parties and the hearing officer accurately analyzed the decision.

We, however, reverse the hearing officer's decision and apply the holding in Yeldell, *supra*, which states that the acts of health and comfort, which include relieving hunger (and, in this case also may have been required in conjunction with the oral medication that she took for her diabetes), were incidental to the employment and the injury, or death in this case, was incidental to the decedent's work and was compensable. We distinguish Bratcher, *supra*, a case in which the employee's aneurysm ruptured while the employee was straining while using the restroom, and Appeal No. 962128, *supra*, which involved a broken tooth which has a large filling which may have "weakened the tooth," on the basis that in both those cases there was an underlying defect which made the employee more susceptible to that injury. As the claimant/beneficiary stated in the appeal, the decedent's "death did not occur as a result of any pre-exi[s]ting condition nor a personal defect." We would also cite the counseling in Yeldell, *supra*, that the 1989 Act should be given a liberal construction to carry out its evident purpose. Nothing in this decision should be read as expanding Bratcher, *supra,* beyond applying underlying defects in personal comfort cases.

Accordingly, we reverse the hearing officer's decision and render a new decision that the deceased employee had sustained a compensable injury on _____, which resulted in her death.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge