APPEAL NOS. 002524
AND 002525

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 October 6, 2000. The issues in Docket No. (1) were:

1. Did the Claimant [appellant] sustain a compensable injury on _____?

2. Did the Claimant have disability resulting from a compensable injury sustained on _____?

The issue in Docket No. (2) was:

Did the Claimant sustain a compensable mental trauma injury on _____?

There was only one hearing and evidence was taken at that hearing on both cases and all the issues. With regard to the issues, the hearing officer determined that the claimant had not sustained a compensable (facial) injury on _____ (all dates are 2000 unless otherwise noted), that because the claimant had not sustained a compensable injury, the claimant did not have disability, and that the claimant had not sustained a mental trauma injury on _____.

The claimant appealed (with identical appeals in both cases), challenging the hearing officer's recitation of the evidence, and apparently asserting that the access doctrine and personal comfort doctrine placed him within the course and scope of employment. Although the claimant does not specifically appeal the findings on disability and lack of a mental trauma injury, we view the appeal of the course and scope of issues as including disability and the mental trauma claim. The claimant requests that we reverse the hearing officer's decision "based on the foregoing reasons for my appeal." The appeals file does not contain a response from the carrier.

DECISION

Affirmed.

The CCH was made more difficult by reference to photographs without specifically identifying which of the almost 70 photographs was being used. The hearing officer did an exemplary job in piecing together the rather disjointed facts and we adopt his rendition of the background facts.

Briefly, the claimant was a van driver for a temporary labor service. There is some disagreement on the timeline when the claimant arrived at work, whether it was 4:15, 4:30,

or 4:45 a.m. In any event, the employer's office was closed (the dispatcher was supposed to arrive at 4:30 a.m. and open the office). The employer's office and labor hall was separated from the adjoining recycling business by a chain-link fence. Behind the employer's business, or perhaps on the adjoining property, the claimant kept a personal coffeemaker where he made his own coffee. The accepted access to the claimant's coffeepot would be through the employer's building. The claimant testified that he both needed to relieve himself and that he wanted to make himself some coffee and because the employer's building was locked, he "squeezed in through the [chain-link] fence" going onto the recycling business property, carrying two glasses of water (to make the coffee). The claimant testified that he relieved himself and because one of the laborers was watching, he started back toward the front of the recycling business premises when he fell over a large piece of metal on the ground falling forward. The claimant said that because he was carrying the glasses of water, he could not break his fall with his hands and that when he fell his face hit a metal object. In evidence is a photograph the claimant took of himself after the fall, showing his bloody face. (The claimant said he had his camera with him in the van.)

The claimant testified that he then made one run in his van, called in to the dispatcher and told the dispatcher of the injury and on return to the employer's office, got permission to drive to the hospital emergency room (ER). When the claimant arrived at the hospital, he told the ER personnel that his injury was a work injury and the hospital called the dispatcher, Mr. T, who in turn called another dispatcher and the employer's customer service representative, Mr. C. Mr. C called the hospital and when asked if the employer would be responsible for the medical care costs, told the hospital clerk that the employer would not accept the claim "at this point." The claimant testified that he "heard a woman saying to another worker . . . that they weren't going to pay" and that he had a "nervous breakdown at that moment," that he "was full of hate" and that he went into "some kind of trance, or something." The claimant contends that this constitutes a mental trauma injury.

Regarding the claimant's allegations of a specific fall injury, it was arguable that this occurred before work because the employer's building was locked and Mr. T was not yet there. The claimant appears to raise the access doctrine by alleging that "[t]here was only one entrance that was used by me to go and urinate . . . ." The access doctrine has been recognized as an exception to the going to and coming from work rule. Texas Workers' Compensation Commission Appeal No. 950156, decided March 9, 1995, cited Standard Fire Insurance Co. v. Rodriguez, 645 S.W.2d 534, 538 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.) for the proposition that:

> If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect, a part of the employer's premises, the injury is one arising out of and in the course and scope of the employment as though it had happened while the employee was engaged in his work at the place of its performance.

In this case, there is no evidence that the claimant had the express or implied consent from the employer that he could squeeze through a chain-link fence to go onto the adjoining recycling property either to relieve himself or to make coffee for himself. We hold the access doctrine not applicable.

The claimant also appears to raise the personal comfort doctrine, contending that "playing football during a break" had been held compensable. The Texas courts have recognized the personal comfort doctrine in Yeldell v. Holiday Hills Retirement & Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985) and, briefly, that doctrine provides that when an employee engages in an act which ministers to the employee's personal comfort he does not thereby leave the course and scope of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred. Traditionally, the personal comfort doctrine has kept an employee in the course and scope of employment while doing such things as eating, getting a drink of water, smoking, and using the toilet facilities. The claimant refers to playing football on break; that case is Texas Workers' Compensation Commission Appeal No. 93484, decided July 30, 1993. In that case, while on a 10-minute break, the employee was tossing a football on the employer's premises with the knowledge, acquiescence, and indeed, the participation of the employee's supervisor. In this case, we hold that the claimant's squeezing through a fence to go onto the property of another in order to relieve himself was such a departure from his job as to exclude the personal comfort doctrine. We distinguish Appeal No. 93484 from this case in that the claimant was not on a break (arguably before work), was not on the employer's premises, and certainly the act was not with the employer's knowledge or acquiescence. We hold the personal comfort doctrine not applicable.

Mental trauma injuries are discussed in Section 408.006, which provides that nothing in the 1989 Act will be construed to limit or expand recovery in mental trauma cases and mental trauma which arises principally from a legitimate personnel action, which would include denial of a claim, is not a compensable injury. Further, as the carrier noted at the CCH, the claimant was not in the course and scope of his employment at the time he sustained his injury, and that the communication was not even made to the claimant, who at best only overheard one side of the telephone conversation. We affirm that the claimant did not sustain a compensable mental trauma injury.

In that we are affirming that the claimant has not sustained a compensable injury, the claimant cannot, by definition in Section 401.011(16), have disability.

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and

preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Kathleen C. Decker
Appeals Judge