APPEAL NO. 012487
FILED DECEMBER 3, 2001

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 September 24, 2001. The hearing officer determined that the appellant (claimant) had not sustained a compensable injury on _____, because she was not in the course and scope of her employment when she fell and sustained a low back injury, and that because the claimant did not have a compensable injury, she did not have disability.

The claimant appealed, relying heavily on the Texas Supreme Court case of INA of Texas v. Bryant, 686 S.W.2d 614 (Tex. 1985) and asserting that the claimant had sustained a compensable injury and had disability. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The claimant began work January 2, 2001, and was employed as a cook and delivery person to prepare breakfast and lunch meals at location 1 to be taken to location 2. After packaging and loading the meals in her personal vehicle (POV) at location 1, the claimant would drive to location 2, unload and assist in the serving of the meals, and return to location 1. The distance from location 1 to location 2 was 11 miles each way and the claimant would perform this duty two times a day. The claimant was paid an hourly wage and worked roughly from 7:00 a.m. to 1:30 p.m. The claimant was paid biweekly when the claimant's supervisor, Ms. A, would go to the employer's main administrative office (location 3), pick up checks, and distribute them to the employees at location 1. In addition to her regular wages, the claimant was also paid mileage reimbursement for the use of her POV for travel between location 1 and location 2 at the rate of $.28 per mile. The claimant would fill out her mileage reimbursement form, submit it to Ms. A, and would get a separate mileage reimbursement check once a month. There was no written or oral procedure as to how this check would be paid. (The claimant was not the only employee to get a mileage reimbursement check.) Testimony established that the four most common ways of disbursing the mileage reimbursement checks were (1) it would be sent with the next regular paycheck, (2) it would be sent to the employee through interoffice mail to be distributed by the supervisor, (3) it could be picked up by the employee personally at location 3, or (4) it could be mailed to the employee's home address.

The question in this case is whether the claimant was in the course and scope of her employment when she went to pick up her February 2001 mileage reimbursement check. Apparently, the claimant's mileage reimbursement form had been returned at least once because it was not completed in ink and there were errors on the form. The testimony was that after the claimant resubmitted the form, she called the clerk at location 3 “every day” to see when her check would be ready. On _____, the claimant was

told her check was ready and, consequently, after the claimant had finished her duties for that day and checked out, she drove to location 3 to pick up her mileage reimbursement check. The claimant picked up her check and, upon leaving the building, stopped to use the restroom where she fell over a step and injured herself.

The claimant relies on the Bryant, *supra*, case to establish that she was in the course and scope of employment. In Bryant, the employee had been laid off after four days of work and, 16 days later, came to pick up her paycheck. The Texas Supreme Court, after commenting that "being paid for work done is within the employment relationship and contract," went on and held that

> when an employee is directed or reasonably believes from the circumstances she is required by the employer to return to the place of her employment to pick up her pay after termination and an otherwise compensable injury occurs, then such an injury is reasonably incident to her employment and is incurred in the furtherance of the employer's affairs.

In this case, the claimant clearly was not directed to go to location 3 to pick up her check and, therefore, the issue is whether the claimant reasonably believed from the circumstances that she was required by the employer to go to location 3 to pick up her check. The hearing officer gave a detailed summary of the evidence and determined that the claimant "did not reasonably believe that she was required by Employer to drive her personal vehicle from [location 1] to [location 3] to pick up her mileage reimbursement check . . . ." Although the claimant testified that she did reasonably believe that to be the case, whether the claimant actually believed that and whether the claimant's belief was reasonable "from the circumstances" were factual determinations for the hearing officer to resolve.

The hearing officer indicated that he did not find the claimant's testimony that she had gone to location 3 eight different times credible in that she received mileage reimbursement checks only once a month and she had only been employed about 11 weeks. The hearing officer commented that "[d]ue to Claimant's option and insistence, Claimant voluntarily chose the manner and method she would exercise in picking up her mileage reimbursement check." We cannot say that the hearing officer erred in applying the law or that his decision was 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).

Although not argued by the parties, we will note that we do not consider the claimant's 20-minute drive from location 1 to location 3 to constitute an incidental deviation from her employment as contemplated in Texas General Indemnity Company v. Luce, 491 S.W.2d 767 (Tex. Civ. App.-Beaumont 1973, writ ref'd n.r.e.). *See also* Texas Workers' Compensation Commission Appeal No. 010163-s, decided March 5, 2001, for cases of incidental deviation from employment.

In that we are affirming the hearing officer's decision that the claimant was not in the course and scope of her employment, the claimant cannot, by definition in Section 401.011(16), have disability.

Accordingly, the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

Thomas A. Knapp
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Michael B. McShane
Appeals Judge