APPEAL NO. 92026

On December 31, 1991, a contested case hearing was held. The hearing officer determined the appellant was not working within the course and scope of her employment when she received injuries in a traffic accident and was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant urges that the "decision is against the manifest weight of the evidence" and asks us to reverse the decision and/or grant a new or further hearing and consideration of the evidence. Appellant also urges that an issue regarding additional earnings which should be included in average weekly wage was "tried by consent" at the hearing.

DECISION

Finding probative evidence sufficient to support the findings, conclusions and decisions of the hearing officer, we affirm. Although rendered moot by the decision in this case, we do not find an issue concerning the amount of average weekly wage was raised or litigated by consent of the parties in this case.

The issue in this case concerns travel by an employee during the normal lunch hour period and which resulted in a serious automobile accident. The focal point in this case is the application of the particular facts to the provision of article 8308-1.03(12), 1989 Act, which provides in pertinent part that the term course and scope of employment does not include:

> "(B) travel by the employee in the furtherance of the affairs or business of his employer if such travel is also in furtherance of personal or private affairs of the employee unless:
>
> > (i) the trip to the place of the 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 trip; and
> >
> > (ii) the trip would not have been made had there been no affairs or business of the employer to be furthered by the trip."

This so called "dual purpose" concept or doctrine was construed by the Texas Supreme Court in the leading case styled Johnson v. Pacific Employers Indemnity Company, 439 S.W.2d 824, 827 (Tex. 1969), where the court stated "the rule can only be invoked 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." If the only benefit of the travel is for the employer, then the dual purpose doctrine would not arise.

When the evidence supports the determination that both the furtherance of the affairs or business of the employer and the furtherance of the employee's private or

personal affairs are involved, the two-prong test of the dual purpose doctrine comes into play. That is, the injury is not deemed to be in the course and scope of employment unless the trip to the place of the occurrence of the injury would have been made even if there had been no personal or private affair of the employee to be furthered by the trip and unless the trip would not have been made except for the business purpose. Wausaw Underwriters Insurance Co. v. Potter, 807 S.W.2d 419 (Tex. App.-Beaumont 1991, no writ). In this case, the Court of Appeals reversed the trial court due to its refusal to give a "dual purpose" instruction where an employee was about to go to lunch with several co-workers when he was approached by the project manager who either asked if he could "tag" along or instructed the employee to get into his vehicle to go to lunch and wherein discussions about the job project ensued en route to lunch.

In United States Fidelity & Guaranty Company v. Harris, 489 S.W.2d 312 (Tex. App.-Tyler 1972, writ ref'd n.r.e.) the court reversed and rendered judgment for the appellant in a "dual purpose doctrine" case where they did not find sufficient evidence that injuries were sustained in the course and scope of employment. An employee, on her way to work, was involved in a fatal automobile accident. A part of her duties involved picking up supplies in her own automobile and taking them to her place of employment. On the morning of the accident, the employee was carrying necessary supplies to her place of work and stopped to get an additional item. She was traveling the usual route to work that she took whether or not she was carrying supplies. The court found the evidence lacking that the second prong of "dual purpose doctrine" was established. The evidence indicated the trip would have been made even if there had been no affairs or business of the employer to be furthered by the trip. Callisbury Independent School District v. Favors, 695 S.W.2d 370 (Tex. App.-Ft Worth 1985); Texas Workers' Compensation Commission Appeal No. 91071, decided December 30, 1991; *See also* Texas General Indemnity Company v. Bottom, 365 S.W.2d 350 (Tex 1963).

In the case *sub judice* the appellant testified that in addition to her secretarial duties for employer she also performed some cleaning tasks for which she was paid from a separate source. On April 1, the employer asked the appellant to buy two cans of Comet cleanser "the next time [she] was in town." On April 2, the appellant withdrew $5.00 from petty cash and thought she might be going shopping that evening. This shopping did not materialize as her husband had some work to do. On _____, the appellant left the office located in (City 1), Texas, at noon time for lunch and went in the direction of (City 2), Texas (some 6 1/2 miles from the office), and was subsequently involved in a serious automobile accident.

According to the testimony of a co-worker, the appellant said when she left that she was "going around the corner for some cigarettes" and did not mention anything about going to buy cleanser. Appellant testified that she only occasionally ate lunch in (City 2) but that on _____ the reason she was going to (City 2) was "to pick up the supplies" and "while I was there I was going to pick up lunch which I could have gone at several

different places normally." She said that except for getting cleaning supplies, she would not have gone to (City 2).

Shortly after the appellant left the office on _____, her husband came by the office to leave her some cigarettes since he noticed that morning that she was low on cigarettes. He stated that several weeks after the accident, he found the $5.00 in cash in her purse. At that time, the appellant's husband told her that she had a claim for workers' compensation benefits since she was going to get cleanser at the time of the accident.

Evidence indicated there were several convenience and grocery stores within approximately one mile of the employer's office where cleanser could be obtained. These were located on a route to the appellant's home. However, prices at these stores were likely somewhat higher than at a store in (City 2) and appellant claimed that from past experience, her employer wanted her to get the cheapest price.

One of appellant's supervisors and employers (Mr. Z) testified that there was no urgency for the cleanser and that he only told the appellant to pick up the cleanser whenever she went to the store. He did not expect appellant to make a special trip to town for such an inexpensive item. He stated the appellant never indicated to him on _____ that she was going to get any cleanser. Both Mr. Z and another supervisor/ employer testified the appellant stated when she left on _____ that she was "going to get a pack of cigarettes and would be right back." Mr. Z also stated the appellant sometimes went to (City 2) for lunch and sometimes went home but "almost never stayed at the office for lunch."

The hearing officer found that the appellant would not have made the trip to the injury site if there had been no personal or private affairs to be furthered by the trip and that the appellant would not have made the trip to the injury site solely to buy two cans of cleanser for the employer. Thus, the hearing officer concluded the appellant was not working within the course and scope of her employment when she received her injuries in a traffic accident on _____.

The evidence was in conflict in several regards concerning the details and purpose of the trip undertaken by the appellant on _____. Of course, this is for the fact finder to resolve [Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)], along with his responsibility of judging the relevance and materiality of the evidence and determining the weight and credibility to be given to the evidence. Article 8308-6.34(e); Texas Workers' Compensation Commission Appeal No. 91037, decided November 20, 1991. The fact finder may believe all, a part or none of a witnesses' testimony [Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)] and the testimony of an interested party, such as a claimant, only raises issues of fact. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ).

Unless, in reviewing a case on a sufficiency of evidence basis, the findings, conclusions and decision are so contrary to the overwhelming weight of evidence as to be clearly wrong and unjust, there is no basis in law or fact to disturb the hearing officer's determination. Employers Casualty Co. v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, n.w.h.); In re King's Estate, 244 S.W.2d 660 (Tex 1951); Cain v. Bain, 709 S.W.2d 175 (Tex 1986).

Although the appellant claims that her primary purpose in undertaking the trip in question was to secure the cleanser for her employer and that otherwise she would not have headed toward (City 2), other evidence indicates that she was on her routine lunch hour, that she had stated she was going to get some cigarettes, that she did occasionally have lunch in (City 2), and that no one had indicated to her that there was any urgency or that a special trip should be made for the cleanser. There was also evidence the accident occurred less than two miles from appellant's place of employment and on roads that the appellant could and did routinely use. Under the circumstances, we find there was probative evidence to support the hearing officer's determination.

The appellant also urges that an issue concerning the amount of the average weekly wage was tried by consent. This involves the matter that appellant, in addition to her normal duties, performed some weekend cleaning duties for which she was paid out of a separate account. *See generally* Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991. Although our disposition of this case renders this issue moot, we note that there was no consent to this issue being before the hearing officer. The respondent specifically refused on the record to consent to the addition of this issue, the issue was not reported out as an issue from the Benefit Review Conference (Article 8308-6.31(a)), and there was no indication either party responded or otherwise contested the issues as set forth in the Benefit Review Conference report. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 142.7 (TWCC Rule 142.7); Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991. We hold the issue was not properly raised nor, for that matter, developed at the hearing. We accordingly reject this assertion of error.

The findings, conclusions and decision of the hearing officer are affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge