APPEAL NO. 93271

This appeal arises under the Texas Workers' Compensation Act, TEX. REV CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On March 9, 1993, a contested case hearing (CCH) was held. The sole issue to be determined was: "Whether Claimant was injured in the course and scope of her employment with (employer) on _____." The hearing officer determined that the claimant sustained an injury (fractured hip) in the course and scope of her employment with (employer). Appellant, herein referred to as employer/carrier, contends that the hearing officer misapplied the law, and perhaps the facts presented at the hearing, and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant, files a response and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Initially we would note that claimant states she received the employer/carrier's request for review on April 13, 1993, and certifies that she delivered her response by certified mail on April 26, 1993, and consequently the response is timely filed. Claimant submits a copy of "Parkland Team Members Guide," a copy of the (City 1) Neighborhood Crime Watch Newsletter dated January 1993, and other documentation with her response. Some of the items such as the Benefit Review Officer's recommendation (part of the hearing officer's exhibit) and Dr. B report dated November 17, 1992 are included in the record of proceedings. Other documentation, which appears to have been available at the CCH but not submitted, will not be considered in that the Appeals Panel is limited in its consideration of evidentiary matters to the record developed at the CCH, Article 8308-6.42(a)(1), 1989 Act. We further note there is no indication that the evidentiary items attached to the response were unknown or unavailable at the time of the hearing or that due diligence would not have brought them to light. *See* Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992.

The facts, as recited in this case, are not disputed, unless otherwise noted. Claimant was employed as a data entry clerk in the security and public safety department of (hospital), which is part of employer/carrier. In her position, claimant wore a uniform which identified her as part of the security department and, on occasion, she performed duties as a backup parking attendant. The hospital had a parking garage on the premises and employees could park their cars in the garage and the hospital would deduct a reduced parking fee from the employee's paycheck every two weeks. The parking garage and the "one hour parking spaces" which were located between the parking garage and the hospital emergency room (ER) were owned and controlled by the hospital. On _____, claimant left her locked car in the hospital parking garage and proceeded to her work station. At approximately 2:30 p.m. on _____, claimant was doing computer data entries and other paperwork when she got a call from the parking attendant in the parking garage that someone was trying to take claimant's car out of the garage.

Claimant told the attendant to hold the car at the gate and that she was "on my way out to the garage." A supervisor (a lieutenant) was not present at the time, and claimant ran from her work station, "which is at the back of security," yelling for help. Officers JJ and BB responded and began running with claimant through the ER to the parking garage. Officer JJ was running ahead of BB and claimant. Claimant states that as she and BB "got . . . between emergency and the garage [she] tripped and fell." It is undisputed that when claimant "fell" she was caught by Officer BB before she hit the ground. BB's statement is that when they ". . . got as far as the 1 hour parking area, . . . [claimant] started to act as if she had a cramp in her right leg, (thigh area). I asked [claimant] if she was O.K. [Claimant] stated back to me that she will be O.K. just stop them from getting [her] vehicle." Both claimant and BB stated they went to the exit from which the attendant had called and that claimant was limping on her right leg. Soon after they arrived at the exit gate, determined the car in issue was not claimant's car and "dealt with" the driver, claimant began to fall. Officer BB was right beside claimant and in his statement said, "I saw [claimant] start to fall. On seeing this start to happen, I just caught her by her arms and picked her up and carried her to the gate house (of the hospital garage)." Both claimant and BB agree claimant was placed in another security officer's car and was taken to the ER dock. Officer JJ got a wheelchair and apparently took claimant to her work station. Exactly what happened next, or for how long, is unclear. Claimant spoke with the director of security, Chief L, told him what happened, perhaps tried to return to work inputting data and then was unable to get out of the chair. Chief L told her to go to the doctor and Officer BB took claimant in the wheelchair to (ACC). Officer BB's statement would indicate he took claimant to the ACC "at 1735 hrs." The hospital outpatient record on _____ indicates claimant was seen at 1559 (3:59 p.m. civilian time).

The medical records, and claimant's testimony, indicate that claimant has had joint problems in the past, that claimant has sickle cell trait and was treated for sickle cell crisis at least once. Dr. B was the treating physician and, in a report dated 11-17-92, records the history of claimant's running, tripping and ". . . a twisting injury to [claimant's] right hip . . . (with) immediate onset of right hip pain." Claimant was assessed to have a "Garden III right femoral neck fracture." Claimant was treated by Dr. S ". . . on 7-18-91 by closed reduction and insertion of multiple cannulated screws." In January 1992 claimant developed constant pain in her right groin area. X-rays at the hospital clinic ". . . on 10/28/92 demonstrated osteonecrosis of the right femoral head with Stage IV disease with segmental collapse." Dr. B states as follows:

> I believe that [claimant] has post-traumatic osteonecrosis and segmental collapse of her right femoral head. This osteonecrotic problem is directly attributable to her fracture which, in all medical probability, occurred at the time of her fall, and in no way is secondary to her preexisting sickle cell disease.

An operative report dated 7-18-91 confirmed "a nondisplaced right femoral neck fracture."

The medical evidence submitted by claimant is unrefuted.

The hearing officer generally found for the claimant, specifically finding "at the time of her injury the claimant had the implied permission of the Employer [hospital] to be engaged in the activity of checking on the reported theft of her car." The hearing officer concluded that claimant fractured her right femoral head in the course and scope of her employment for the hospital. The employer/carrier appealed alleging that while the hearing officer "was correct in holding that the emergency or rescue doctrine was applicable. . . ." the hearing officer "misapplied the facts of this case to that doctrine." The employer/carrier believes the case law in Texas that to be compensable the employee, at the time of the injury, must be furthering the affairs of the employer and that the employer must have a legitimate business interest in what is involved in the emergency.

We note that the hearing officer, as authority for his decision, cites Brightman's Case, 220 Mass. 17, 107 N.E. 527 (1914). Although Larson Workmen's Compensation Law, Vol. 1A, § 28.11, page 5-441 cites Brightman's Case, *supra*, for the proposition that ". . . the employee has a right to attempt to save personal belongings on a sinking ship" the facts of the case do not really support that statement. The claimant in Brightman was a cook who was required by the employer to stay aboard a "lighter" (a large, usually flat bottomed, barge typically used in loading and unloading ships). The lighter began to sink and the employee made several trips below deck to bring his personal possessions and survey equipment on deck. In the course of these events the employee suffered a heart attack attempting to save his clothes and survey instruments. When he got to the dock the employee died. The court held that the sinking of a ship was a peril of the sea arising out of and in the course of employment. The court did note that it was ". . . impossible to say as a matter of law" that it is not instinct to save one's possessions and the employee did not abandon the service of the employer.

As a general rule, an injury sustained in the course of employment (1) must be of a kind or character originating in or having to do with the employer's work, and (2) must have occurred while engaged in the furtherance of the employer's business or affairs. Biggs v. United States Fire Ins. Co., 611 S.W.2d 624, 627 (Tex. 1981). Therefore, to be compensable it is necessary to show a causal connection under which the work must be done and the resulting injury. Nations & Kilpatrick, Texas Worker's Compensation Law, Vol. 1 § 3.01[2][a], pp. 3-6. In Texas Employers Ins. Ass'n v. Page, 553 S.W.2d 98 (Tex. 1977) a bank security guard's knee buckled as he was walking across the parking lot and the court held it was ". . . a fact issue of whether the injury originated out of Page's employment, that is whether there was a sufficient causal connection between the conditions under which his work was required to be performed and his resulting injury."

The employer/carrier cites Montgomery v. Maryland Casualty Company, 151 S.E. 363 (Sup. Ct. Ga. 1930) where the Georgia Supreme Court held that a watchman was not in the course and scope of his employment while attempting to save his personal watchdog

from drowning in a nearby river. The court held the case not compensable noting that the dog was "not necessary equipment" and "not an emergency." As applied to the facts of this case, the persuasive value of the cited case may be questionable. Although not clear from the case, we might question whether the river was part of the employer's premises. Would the result have been the same if the watchman had been injured on the employer's premises trying to catch a person who was stealing the dog? Or would the result be more like the case of Snyder v. Hirsch, 132 NYS 61 (1954) where a delivery boy was injured trying to catch a person who was stealing his bicycle, which was admittedly used to perform work duties? We believe Montgomery, *supra*, can be factually distinguished from the instant case where claimant was clearly on the employer's premises and was arguably taking reasonable steps to protect vehicles in the employer's parking garage.

The employer/carrier also cites Texas Employers' Insurance Ass'n v. Thomas, 415 S.W.2d 18 (Tex. Civ. App.-Fort Worth, 1967, no writ) where a truck driver who was driving the employer's truck was within the scope of his employment while searching for a billfold belonging to one of the occupant's of a wrecked automobile which was blocking the highway and prevented the driver from proceeding. The court held:

> A servant does not cease to be in the course of his employment merely because he is not actually engaged in doing what is specially prescribed to him, if in the course of his employment an emergency arises, and, without deserting his employment, he does what he thinks necessary for the purpose of advancing the work in which he is engaged in the interest of his employer.

Although the facts in Thomas are clearly distinguishable, we believe that the principle of law is analogous. In the instant case, claimant was a uniformed member of the employer's security department and on occasion performed backup duties as a parking attendant in the parking garage. When the call came that claimant's car was being stolen, and it could well have been anyone's car, claimant obtained assistance and went to investigate. Paraphrasing the Thomas court, claimant did what she thought was necessary for the purpose of both securing her car and preventing theft and vandalism in the employer's parking garage. As such she was both advancing the work of the employer in maintaining safe and secure parking facilities as well as investigating the reported theft of her car. Employer/carrier states the truck driver in Thomas was "helping with auto wreck so he can continue his truck driving." We note that the driver in Thomas actually had loaned his flashlight to someone else to look for an injured passenger's billfold when he "slipped and fell off the bridge . . ." while also looking for the billfold. We believe the employer's interest in the instant case was being furthered at least as much as the truck driver's employer's interest was being furthered in looking for a billfold belonging to a passenger in another vehicle. We further believe the claimant in the instant case was doing what seemed reasonable and necessary to respond to the emergency and advance the work of the employer. Nations & Kilpatrick, *supra*.

Employer/carrier cites Dallas Independent School District v. Porter, 759 S.W.2d 454 (Tex. App.-Dallas 1988, writ denied) for the proposition that "just because the claimant is on the premises and just because the incident occurs with either the expressed or implied consent of the employer, this does not necessarily make the incident compensable." We would agree with the proposition of law but distinguish Porter on a factual basis. Porter, *supra*, was a case where a school janitor was shot to death on the school premises by the grandmother of a student the employee had reprimanded and spanked. The janitor had left the school premises, spanked the student and then had been called into the office to speak with the student's grandmother. Later, on seeing the janitor in the hallway, the student's grandmother shot him. The court specifically held that when Porter, the employee, "left the school property to discipline (the student), he was not acting in pursuit of his duties as an employee or in the furtherance of his employer's business." There is a whole line of cases involving assaults by third persons, under the "personal animosity exception," none of which are applicable to the present case. Similarly we do not consider the "personal convenience" line of cases applicable.

In St. Paul Insurance Company v. Van Hook, 533 S.W.2d 472 (Tex. Civ. App.-Beaumont 1976, no writ), the employee was a 17-year-old who was employed by the YMCA as a part-time janitor. The employee was instructed by his supervisor to stop vandals from breaking windows. Apparently the employee determined who the vandals were and challenged them to a boxing match during which the employee suffered dental injuries. The court held "[t]here is certainly no question here but that the plaintiff was trying to follow his employer's instructions. He might have chosen wiser means (such as phoning the police), but a seventeen year old boy is calculated to be influenced by the suggestions of adults to settle the dispute in the ring. Had the fight and injury occurred on the parking lot, there is little question of its compensability. To cut it off when they moved into the boxing ring would, we think be unreasonable. . . ."

A case that may appear similar is Roberts v. Texas Employers' Insurance Ass'n, 461 S.W.2d 429 (Tex. Civ. App.-Waco 1971, writ ref'd n.r.e.). In Roberts, *supra*, the employee, while on the premises, after drinking coffee, "before punching the time clock," asked her superintendent if she could have one of her employer's boxes. "She testified she had not started to work, but `was ready to go to work.'" The supervisor gave her the box and the employee was injured when she started to her car to put the carton in her car. The employee testified the purpose for which she wanted the box was "purely personal." The court held that the accident and attendant ". . . injuries did not arise out of her employment; they did not have to do with or originate in her employer's business; and she was not engaged in the furtherance of her employer's affairs or business. . . ." It was held the employee ". . . was engaged on a purely personal mission and the injury was not compensable." We distinguish Roberts from the instant case in several ways. One, although not mentioned by the court but clearly evident in the decision, was that the employee in Roberts had not yet started work. She was on the premises, finished her coffee and asked for the box. Claimant in the instant case was at work, at her work station,

when the parking attendant called. Secondly, the employee in Roberts wanted the box for purely personal reasons and her employer had no interest in having the employee take the box to the employee's car. In the instant case claimant was a uniformed member of the security department, albeit her principle duty was as a data entry clerk, with occasional duty as a backup parking garage attendant. By reason of the fact that the employer had a security department, which obviously staffed the parking garage attendant positions, the employer had a business interest in maintaining the safety and security of the premises, including the parking garage. In the case before us, claimant did not casually take a box to her car before reporting for duty, rather the parking attendant called, and reported what she believed to be the theft of claimant's car in progress. The hearing officer noted, as have we, the employer clearly had an interest in the security of its parking garage and had taken reasonable steps to protect vehicles in its parking garage. When the employer's parking attendant telephoned claimant it could reasonably be anticipated that she would act as she did. Under those circumstances, the employer had a business interest in preventing auto thefts from its parking garage, be it the claimant's car or any other car. Claimant responded by getting two male security guards to assist her and running to attempt to prevent the theft of a car, albeit she had a personal interest being it was her car that she thought was being stolen. Had one of the male security guards broken a leg answering this call, the injury would have been clearly compensable. Under the circumstances, to cut claimant off just because it was her car that the parking attendant believed was being stolen, we think is unreasonable. Claimant had not abandoned her employment, claimant was a uniformed member of the security department, the employer had an interest in protecting the vehicles in the parking garage and claimant on occasion had parking attendant functions. For these reasons we affirm the hearing officer's findings and conclusions that claimant was in the course and scope of her employment (without placing much reliance on Brightman's Case, *supra*).

Employer/carrier in the alternative argues that the findings of fact and conclusions of law are so contrary to the evidence as to be manifestly unjust and wrong, citing that claimant had been limping on the injured leg three or four weeks prior to the incident in question and that claimant never actually fell to the ground. Whether claimant sustained the injury as described by her, or whether she had a preexisting condition, and the particular circumstances of her tripping and stumbling, are factual questions for the trier of fact. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e). We would note that Dr. B's statement that claimant's ". . . osteonecrotic problem is directly attributable to her fracture which, in all medical probability, occurred at the time of her fall, and in no way is secondary to her preexisting sickle cell disease," is unrefuted. Nor is there any contradicting evidence that the initial hip fracture was caused by anything other than the tripping, stumble and twisting of being caught by Officer BB. In fact Dr. B notes claimant ". . . tripped while running and had a twisting injury to her right hip. . . ." Officer BB's statement does not contradict this but rather notes claimant acted ". . . as if she had a cramp in her right leg (thigh area)." It is undisputed that claimant never "hit or land(ed) on the ground." Nevertheless, Dr. B believes, with

reasonable medical probability, that claimant sustained the twisting injury to her hip in this fall.

Finding that the hearing officer's findings are supported by sufficient evidence and that his determinations are not contrary to law, we affirm.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge