APPEAL NO. 950215

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 in (city), Texas, on January 11, 1994, to determine whether the claimant was injured in the course and scope of her employment on (date of injury), whether she notified her employer of an injury within 30 days or whether the employer had actual knowledge of the injury, and whether the claimant suffered any disability as the result of a compensable injury. The hearing officer, (hearing officer), determined all these issues in the claimant's favor and the carrier takes this appeal, citing evidence which it believes indicates the hearing officer's decision was in error. The claimant basically responds that the hearing officer's decision is correct and should be affirmed.

DECISION

The hearing officer's decision is reversed and a new decision and order rendered.

The claimant had been employed as a life insurance agent by (employer). Her job required her to visit clients and potential clients, selling policies and collecting premiums. She said that her supervisor, (Ms. B), worked with the agents to assist them with sales and with collecting on past due accounts. On the date of injury, (date of injury), claimant and Ms. B had met at employer's office and then the two proceeded to go out making sales calls within the areas assigned to claimant. In the afternoon they tried unsuccessfully to call on a (Mrs. G), then decided to take a late lunch (around 3:30 p.m.) before trying to contact Mrs. G again. The two went to a Chinese restaurant where, claimant said, they discussed work and made plans for the afternoon's calls. As claimant was leaving the restaurant she slipped on some water on the floor and fell, hurting her back, neck, and legs. She said that the following day she told (Mr. P), employer's district manager, that she had fallen and injured herself during lunch and asked him to file a workers' compensation claim. On October 6th she also prepared a written statement, although she acknowledged that the latter, along with the written statement of Ms. B, said only that she slipped and fell at a restaurant during lunch and did not mention that she was engaged in any work-related activities at the time of injury. Claimant said Mr. P told her that he would have to contact the home office, but that he later told her that it could not be handled as a workers' compensation claim.

Mr. P testified that claimant informed him on (date), that she had fallen while at lunch and that she wanted to file a workers' compensation claim. He agreed that he called the home office, and that he was told that claimant did not have a workers' compensation injury because it happened during the lunch hour. He said neither claimant nor Ms. B told him they had been working during lunch, and that he did not become aware that claimant was contending her injury had occurred within the course and scope of her employment until Ms. B submitted an amended statement saying the two had been discussing business. (The evidence shows that an Employer's First Report of Injury or Illness (Form TWCC-1) was filed on September 21, 1994.) Mr. P also acknowledged that he sometimes went into the field with agents and over lunch gave them tips that could improve their job performance.

Both the claimant and Mr. P testified that the employer did not pay for employee's lunches nor direct when or where an employee was to eat lunch. Claimant agreed, in response to questions by carrier's attorney, that her lunch hour is her own time and that she was "killing time" until she could try to catch Mrs. G at home.

The claimant testified that she was off work due to her injury for approximately one week but that she returned and continued working until January 28, 1994, when her doctor, (Dr. V), took her off work because the driving was exacerbating her back pain. The claimant said she had not worked since that time. According to a November 29, 1994, letter from Dr. V, he had last seen claimant in April 1994, but stated that she "remains off work." He continued to recommend that she have an MRI of the lower back.

The carrier in its appeal raises as error the following findings and conclusions of the hearing officer:

FINDINGS OF FACT

8.While at lunch at the restaurant, claimant and her supervisor discussed prospects to whom claimant might sell insurance, added up the collections they had made so far, and planned the balance of their day.

9.The activities transacted during the lunch period were conducted by Claimant with her supervisor, and clearly furthered the business interests or affairs of Employer.

11.Claimant's supervisor, [Ms. B], saw claimant fall and had actual knowledge that she was injured on (date of injury).

12.[Ms. B] knew on (date of injury), that claimant had been conducting Employer's business while at lunch on that date.

CONCLUSIONS OF LAW

3.Claimant was injured in the course and scope of her employment on (date of injury), when she slipped and fell in a restaurant at which she had been furthering the business interests or affairs of Employer.

4.Employer received notice within 30 days of (date of injury), because Claimant's supervisor had actual knowledge of Claimant's injury on that date.

5.Claimant suffered disability from October 13 through October 24, 1993, and from January 5, 1994, through the date of this hearing.

The claimant in a workers' compensation case bears the burden of proving that an injury occurred within the course and scope of employment. The latter term is defined in pertinent part by the 1989 Act as:

> . . . an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations . . .

Section 401.011(12).

In Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977), the court emphasized that the injury must have occurred while the employee was engaged in or about the furtherance of the employer's business, and the injury must be of the kind or character that has to do with and originates in the employer's work, trade, business or profession. An injury can be found not to be compensable if facts establish the first prong of this test, but not the second. American General Insurance Company v. Williams, 227 S.W.2d 788 (Tex. 1950). In its appeal the carrier contends that the claimant failed to show facts establishing the second prong of the test, and that she was not furthering the employer's business while eating lunch at the restaurant. In response, the claimant cites cases concerning the personal comfort doctrine which state that acts such as quenching thirst or relieving hunger are considered to be incidental to the employee's service and are not a deviation therefrom. Even if the lunch were found to be a social event, claimant argues, the evidence shows that she was furthering the employer's business at the time.

Professor Larson in his treatise on workers' compensation law discusses lunchtime injuries, both within and without the context of the "coming and going" rule (which, of course, is not involved in the instant case)[1], and draws a distinction as to whether the injury occurred on or off the employer's premises. He notes the general rule that lunch hour on the premises should be deemed to be within the course and scope of employment, reasoning that "as long as the employee is on the premises he is subject to all the environmental hazards associated with the employment, and . . . although he may be free to go elsewhere during the interval, he is in some degree subject to the control of the employer if he actually chooses to remain on the premises, merely by virtue of being present on the employer's property." 1A Larson's Workmen's Compensation Law, § 15.51, 21.21 (Matthew Bender 1993).[2] Larson also states that when the "exceptional facts are present which convert an

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[1] *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 92026, decided March 9, 1992, which involved application of the dual purpose exception to the general rule of noncompensability for lunch time injuries incurred while going and coming to work.

[2] Cases in which a lunchtime injury occurred on the employer's premises and the employee was found to be an invitee include Texas Workers' Compensation Commission Appeal No. 92009, decided January 21, 1992, and

off-premises excursion for lunch into part of the employment for purposes of injuries received while going and coming, it may be argued that, in the interests of consistency, an injury occurring in the course of or resulting from the lunch itself is also in the course of employment." *Id*., § 21.23. Cases from other jurisdictions cited for this proposition (no Texas cases are cited) generally have included those wherein the employee is engaged in an off-premise activity during the lunch period in furtherance of the employer's interests and at the direction or with the consent of the employer.

A similar argument to the one in the instant case was raised in Texas Workers' Compensation Commission Appeal No. 92213, decided July 10, 1992, in which it was claimed that the fatal injuries suffered by an employee during lunch in a restaurant were compensable. As in this case, the claimant (the decedent's spouse) introduced evidence to show that the luncheon, while not sponsored by the employer, was an occasion for discussion of an incentive program that would benefit the employer. In upholding the hearing officer's decision that the injury was not compensable, that panel cited Mersch v. Zurich Insurance Company, 781 S.W.2d 447 (Tex. App.-Fort Worth 1989, writ denied) and Clevenger v. Liberty Mutual Insurance Company, 396 S.W.2d 174 (Tex. Civ. App.-Dallas 1965, writ ref'd n.r.e.) for the proposition that a social engagement is in the course and scope of employment if the employment derives from it a benefit which is direct and substantial, as opposed to intangible. While the panel agreed with the claimant that Texas Employers Insurance Association v. Prasek, 569 S.W.2d 545 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.) states that acts of a personal nature such as quenching thirst or relieving hunger are incidental to an employee's service (and that injuries sustained thereby should be compensable), it stated that that case nevertheless "does not depart from the principle that an employee must still be in the course of employment during the time such activities are being performed." Despite evidence showing discussion of work-related issues, the panel wrote: "It is hard to envisage any social gathering among colleagues which would not involve discussion of the work place. No doubt, many of the programs discussed at such occasions are beneficial to the employers. However, the mere fact that business is discussed does not make an engagement any less of a social occasion." The panel also noted that the deceased was not exposed to any greater risk of injury or death due to any particular feature of her employment.

While not a lunchtime injury case, *see also* Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994, where the panel upheld a determination of noncompensability where the employee's injury occurred when she tripped in the lobby of her employer's building while allegedly carrying work which she was going to do at home. The panel noted that the evidence showed the employer had not directed the employee to perform work at home and there was a fact issue whether the employer had consented to the claimant's actions.

Texas Workers' Compensation Commission Appeal No. 91019, decided October 3, 1991.

While this case contained evidence that would support a finding that the claimant and her supervisor discussed the day's business over lunch, we nevertheless find the record devoid of the type of evidence which would bring claimant's injuries at the restaurant within the course and scope of her employment. She conceded that lunch was her own free time, that she was not directed as to where or when to eat, and that in fact she and Ms. B were "killing time" before they paid another call on Mrs. G. Any discussion of the employer's business (according to the claimant, "the people we had seen . . . the people we were going to see . . .") appears to have been only incidental to their presence for purposes of eating lunch, and was not shown to have directly and substantially benefitted the employer. Moreover, the claimant's employment did not expose her to any greater risk of slipping on a wet floor; such injury was not of the kind or character originating in the employer's business. Thus, we find, the injury did not satisfy the two prongs of the test articulated in Texas Employers Insurance Association v. Page, *supra*. To hold otherwise, we believe, would extend the umbrella of workers' compensation insurance coverage to any person who, on his own personal time and without knowledge, consent, or direction of the employer, happened to discuss a business-related matter. Nor can we agree that this case presented any extraordinary circumstances that would merit placing it in the category of compensable injury. Despite the language in the dissent indicating that the claimant had been placed by her employment in a particular geographical area distant from her office location, there is no evidence in the record to support such assumption.

The claimant also argues that the "personal comfort" doctrine applies; this doctrine (also discussed by Larson, *supra*) has been applied to relieve employees in certain circumstances from being found to have deviated from the course and scope of their employment at the time of injury. *See* Yeldell v. Holiday Hills Retirement & Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985). Chief Judge Sanders recently discussed this doctrine in Texas Workers' Compensation Commission Appeal No. 950057, decided February 24, 1995, in which the Appeals Panel reversed a determination that an employee of a car dealership, on his way in a customer's car to a fast food restaurant, was compensably injured. We believe his analysis is pertinent in this case:

> The personal comfort doctrine is a narrowly drawn exception to the general rule that the accomplishment of personal work or objectives is not within course and scope . . . Larson discusses the lunch time on the premises exception and notes that generally special or exceptional circumstances are needed to bring an off premises lunch period injury within course and scope. The personal comfort doctrine would not normally apply if the claimant was injured during a normal lunch break where he chose to leave the premises and have lunch where he pleased. There are no special or exceptional circumstances present here which would cause the personal comfort doctrine to apply. In Texas Workers' Compensation Commission Appeal No. 94079, decided February 28, 1994, the Appeals Panel affirmed an award of benefits where a claimant was injured during a break in an employee owned building across the street from the building in which she worked. In affirming, we noted the

> fact the claimant was on an authorized break, was on premises owned by the employer, the close proximity of the fall to the work place, that the claimant was not violating any employer restrictions and that no question was raised that the claimant was not at her work site or immediately adjacent to it . . . [*See also* Appeal No. 91019, *supra*] a case applying the doctrine from an approved jury instruction as follows: ". . . an act at the place or area of employment necessary to the health, comfort, and convenience of an employee while within working hours, during a lunch period, or while preparing to begin work or leave the premises, is not a departure from the course of employment."

Based upon our review of the evidence, along with an analysis of case law, Appeals Panel decisions, and Professor Larson's treatise, we are of the opinion that the hearing officer's determination that claimant was compensably injured is against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We therefore reverse the hearing officer's decision and order and render a new decision and order that the claimant was not within the course and scope of her employment at the time she was injured on (date of injury).

As to the two other issues before us, we find that the hearing officer's determination as to disability is also in error as the 1989 Act requires the existence of a compensable injury as a prerequisite to disability. Section 401.011(16). As to timely notice of injury, we do not find that the evidence supports the hearing officer's determination that claimant's supervisor, Ms. B, had actual knowledge of claimant's injury because the evidence does not demonstrate that Ms. B was aware that claimant was contending that she suffered a work-related injury. By the same token, evidence in the form of claimant's testimony and that of Mr. P shows that claimant promptly told the latter that she wished to pursue a workers' compensation claim, although he said he was later told by his management that the claimant's injury was not compensable. As we held in Texas Workers' Compensation Commission Appeal No. 950017, decided February 17, 1995, what is otherwise timely notice of an injury does not cease to exist because an employer or carrier believed that the injury itself was not compensable; for that reason, we would uphold the hearing officer's conclusion of law that the claimant timely notified her employer of an injury. That point, however, becomes moot in light of our determination of the underlying issue of compensability.

The hearing officer's decision and order are reversed and rendered, as provided herein.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

DISSENTING OPINION:

I dissent. I would affirm the decision of the hearing officer. Texas Workers' Compensation Commission Appeal No. 92213 cited by the majority is distinguishable in that it affirms a hearing officer's decision, and it recites facts that friends and spouses joined a lunch honoring a particular boss. The case on appeal includes facts that claimant's supervisor was with her planning work at lunch, after which injury occurred. In addition, the majority quotes from Appeal No. 950057 which indicated that a worker chose to leave the (work) premises for lunch. The decision may be affirmed also because the record shows that in the case on appeal claimant was a resident of (city), Texas, but did not work in an office (on premises) the day in question. She was with her supervisor attempting to make collections in the area she serviced, (R) and (B). While these are not a great distance from (city), Mapp v. Maryland Casualty Co., 730 S.W.2d 658 (Tex. 1987) reversed and remanded a court of appeals decision that had affirmed a summary judgment for carrier involving a similar distance. In that case a woman employed in (city) was working in (city) when she left the premises for lunch and was assaulted. The dissent in Mapp v. Maryland Casualty Corp., 725 S.W.2d 516 (Tex. App.-Beaumont 1987) commented that it was not possible for her to return to her home, her temporary site of work in (city) had no food on the premises, and it was incidental to her employment to have food for lunch. The Supreme Court, in reversing, said a fact question was presented. The case on review also presents a fact question which the hearing officer has addressed. The evidence sufficiently supports affirmance.

Joe Sebesta
Appeals Judge