APPEAL NO. 950444

This case returns for review pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), following this panel's remand in Texas Workers' Compensation Commission Appeal No. 93270, decided May 24, 1993. The Appeals Panel in that case reversed and remanded for further findings concerning application of the access doctrine. A hearing on remand was reconvened on October 25, 1993, and concluded on February 8, 1995, in (city), Texas, with (hearing officer) presiding. After further evidence was admitted into the record, the hearing officer determined that the claimant did not sustain a compensable injury in the course and scope of his employment. The claimant seeks our review, contending that the great weight of the evidence supports his position.

DECISION

We affirm.

The facts of the instant case are detailed in Appeal No. 93270 and will not be repeated at great length herein. Basically, the claimant, an employee of (employer), injured his arm when he tripped and fell in front of employer's facility. The case was remanded for further development of the evidence regarding the area in which the claimant fell. At the first hearing the claimant said he drove to work, parked his car on a public street, then while walking across the street to the main entrance of employer's building he tripped while going up onto the sidewalk in front of the building. He also stated that he approached the sidewalk from an area in front of the building which he said was a reserved parking area for supervisors.

At the hearing on remand (Mr. G), employer's director of safety and compliance, stated that employees have no choice but to park on the street because the employer provides no parking. He said an employee must park "anywhere he can," and that employees get to work "however means that they possibly can." There was an area of the curb in front of the facility which Mr. G said the city had marked with stripes at the employer's request and which was marked "Reserved Parking;" nevertheless, Mr. G said the employer was told by the city that it could not restrict this area to employees only, and that anyone could park there. The employer had hired a guard to patrol the outside area due to complaints about license plates being stolen.

Employer's building was leased; Mr. G said it was his understanding that pursuant to the lease agreement the employer was responsible only for maintaining the land and improvements which he interpreted as meaning the building itself and not the sidewalk. He said that employer did not maintain the sidewalk in any way. Because the lease described the leasehold by a metes and bounds description, a surveyor's opinion was requested. A letter from (Mr. I), a professional land surveyor, states that he reviewed the survey of the property and that "[f]rom what I can determine, the area between the face of the building (i.e., property line) and the curb of the street is public right-of-way, and that any

improvements located thereon are not part of the subject property." Mr. I stated, however, that he had not personally visited the site and had no knowledge of any improvements that might have been deleted or added since the date the survey was performed, in 1979.

In holding the claimant's injuries noncompensable, the hearing officer determined that the claimant fell on a public sidewalk which was not controlled by the employer nor intended by the employer to be used as access to the facility. In his appeal the claimant basically argues that employees are forced to park their vehicles around the facility and that the employer condoned the use of the parking area in question as it hires a guard to patrol the area.

The access doctrine, an exception to the general rule that injuries suffered in the course of going to and from work are not compensable, arises where an employer has evidenced an intention that the particular access route or area be used by the employee in going to and from work, and where such access route or area is so closely related to the employer's premises as to be fairly treated as a part of the premises. Texas Compensation Insurance Company v. Matthews, 519 S.W.2d 630 (Tex. 1974). For example, injuries occurring within a parking lot owned by an employer which authorizes its employees to park there have been held to be compensable to the same extent as if the injury occurred on the employer's main premises. Bordwine v. Texas Employers Insurance Association, 761 S.W.2d 117 (Tex. App.-Houston [14th Dist.] 1988, writ denied. Other cases have examined compensability where an employer was injured while going to or from work on streets, sidewalks, or adjacent areas. In Kelty v. Travelers Insurance Company, 391 S.W.2d 558 (Tex. Civ. App.-Dallas 1965, writ ref'd n.r.e.), an employee slipped and fell upon an icy sidewalk some ten to 12 feet from an entrance to her employer's building. Citing case law concerning the access doctrine, the court reversed a summary judgment for the carrier since the case presented facts which the carrier said could have supported a finding of compensability, including the fact that the sidewalk was an appurtenance to the premises leased by her employer as specifically designated in the lease. In addition, the court noted, the evidence showed that her employer assumed responsibility for maintenance of the sidewalk where the landlord did not do so. In short, the court held, a fact question was presented and "each case must be determined upon its own particular facts."

However, in Matthews, *supra*, the Supreme Court stated that the *Kelty* court had carried the access exception "as far as it reasonably could be, without an amendment to the [statute]." The court in Matthews affirmed the noncompensability of an employer's injury on a public street, where the employer had not attempted to exercise any control over the street, which formed no part of its premises and which subjected members of the general public to the same hazards.

A case with facts somewhat similar to the instant one is Standard Fire Insurance Company v. Rodriguez, 645 S.W.2d 534 (Tex. App.-San Antonio 1982, writ ref'd n.r.e.), in which the employee was injured when she fell from a loading dock adjacent to an entrance to the building occupied by her employer. In holding the injury compensable the court noted

that while the employer did not lease the loading dock it had rights in and to the dock, which was used in furthering the employer's business, which was not an area used by the general public (as the court specifically noted, the dock was not a public sidewalk) and which was a means of ingress and egress impliedly permitted and recognized by the employer as a means of access to the work.

While the facts before us could tend to show some indicia of employer's control outside of the actual work place as noted by the claimant in his appeal, nevertheless the evidence sufficiently supports the hearing officer's determination that the area in which the claimant fell was a public area neither owned nor controlled by the employer. Claimant fell while stepping from a public street up onto a public sidewalk which, the evidence showed, the employer did not own, maintain, or control. As such, the facts of this case are similar to those in Texas Workers' Compensation Commission Appeal No. 950156, decided March 9, 1995, which affirmed a finding of noncompensability where a claimant, upon leaving work, was injured as she stepped between the sidewalk and street near her place of employment. There, as here, we found the evidence sufficient to support the hearing officer's factual determination that the injury was "a consequence of risk and hazards to which all members of the traveling public are subject rather than hazards having to do with an originating in the work or business of the employer," citing Kelty at 562.

In short, upon our review of the evidence we find the hearing officer's decision not to be so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer's decision and order are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge