APPEAL NO. 960959

A contested case hearing (CCH) was held on March 18, 1996. With respect to the single issue before him, the hearing officer held that the claimant's _____, injury occurred on a public street and that therefore it was not compensable under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). In her appeal the claimant says that the hearing officer erred, under the facts of the case and Texas case law, in determining that the case did not come within the access doctrine. She also contends that the hearing officer erred in excluding photographs which purported to show the employer's control over the area in question. The self-insured governmental entity (referred to herein as employer or carrier, as appropriate) responds that the facts and the law are as found by the hearing officer, who did not err in excluding claimant's late-exchanged evidence.

DECISION

Affirmed.

The claimant had worked for the employer, as an assistant director of enforcement in the domestic relations office, for the past six and one-half years. She was injured on _____, when she was struck by a car while crossing the street on her way to work. Her leg was broken and she testified that she may need knee replacement in the future, as well as surgery to replace pins in her leg.

The claimant's injury occurred as she was proceeding toward her place of work from the parking garage owned by her employer. She said that the monthly parking fee was deducted from her wages, that the general public was not allowed to park in the garage, and that the employer had someone occasionally patrol the garage during the day. She acknowledged that other parking facilities were nearby but that they cost more to use. Claimant described her route from the garage to her place of employment, which involved walking down a driveway adjacent to a building then crossing (street name 1) and (street name 2). She said this was the most direct route to her office, which was approximately 100 feet from the garage, and that she first crossed whichever street had the green light. According to her testimony and a hand-drawn diagram, the claimant was on the east side of (street name 2) when she was hit by the car.

While acknowledging that she was injured on a public street, the claimant argued that the route she was traveling is largely used by the employer's employees at that hour of the morning. She also contended that the employer exercised control over the area by providing deputies to direct traffic coming out of the parking garage on another side, facing (street name 3), and she attempted unsuccessfully to introduce into evidence photographs which purported to illustrate this. She also said that her employer has restricted sidewalk access during periods of construction, although on the date of injury there was no construction to avoid. After she was struck, she said, deputies diverted traffic until someone from the police department showed up.

Ms. K, employer's workers' compensation specialist, stated that employees do not have to walk any certain route in order to get to work, and that the employer does not exercise any control over the public street.

In his discussion of the evidence, the hearing officer wrote:

> The "access doctrine" . . . considers compensable an injury that would otherwise be noncompensable because incurred during travel to and from work. Such injury may be held to be sustained in the course and scope of employment if it occurs at a place intended by the employer for use by the employee in passing to and from the actual place of work, on premises owned or controlled by the employer, or closely related to the employer's premises as to be fairly treated as a part thereof.
>
> It has been held that whether an injury comes within the access doctrine is generally a question of fact. It is uncontroverted in this case that the claimant was struck by a private vehicle in a public street. There was no showing by the claimant that the employer maintained or exercised control over this public thoroughfare. The employer did not maintain the sidewalk at this intersection, nor there was [sic] a showing that the employer intended this particular access route to be used by the employees in preference to any other area. [Citations omitted.]

The hearing officer concluded his summary by stating that claimant's injury occurred on a public street and as such was a consequence of the risks and hazards to which all members of the traveling public are subject.

At the outset, we address the claimant's point of error concerning the hearing officer's exclusion of three photographs which were exchanged four days before the March 18, 1996, CCH. Claimant's attorney, who said she was hired on the date of injury, maintained that an officer is not always present to direct traffic and that "We got them [the pictures showing this activity] as soon as we could." The Commission's discovery rule, Rule 142.13 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13), provides that parties shall exchange documentary evidence no later than 15 days after the benefit review conference, which occurred in this case on January 18, 1996; thereafter, such evidence shall be exchanged as it becomes available. Unexchanged evidence may not be admitted except upon a determination of good cause. In the instant case, while the claimant argued on appeal that employer's personnel "are controlling the public streets surrounding the parking garage at various times and not every day," the claimant has provided no specifics to substantiate why the photos could not have been made and exchanged earlier. We find no error in the hearing officer's refusal to admit them.

Turning to the chief issue on appeal, we note that the hearing officer fairly stated the

law in this case. The general rule is that workers' compensation benefits do not apply to injuries received going to and from work. Texas General Indemnity Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963). An exception is those cases which come within the access doctrine, where "the 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 Workers' Compensation Insurance Co. v. Matthews, 519 S.W.2d 630 (Tex. 1974).

Matthews concerned an employee who, like the instant claimant, was injured when she feel in a street on her way to work. In that case, the Supreme Court briefly summarized prior cases concerning the access doctrine, including Kelty v. Travelers Insurance Company, 391 S.W.2d 558 (Tex. Civ. App.-Dallas 1965, writ ref'd n.r.e.), which found compensable injuries sustained when an employee slipped on an icy sidewalk 10 to 12 feet from the employer's building, which sidewalk was found to be an appurtenance to the premises leased by the employer who was responsible for maintaining it. However, the court wrote that the Kelty court had carried the access exception "as far as it reasonably could be, without an amendment to the Workmen's Compensation Act," stating that "no case has extended the `access exception' out into the public streets where other members of the public are subject to the same hazard."

This language was cited in Texas Workers' Compensation Commission Appeal No. 950156, decided March 9, 1995, a case similar to the instant one in which the claimant, standing in a public street, was forced to step backwards, breaking her foot and ankle, to avoid being hit by a car. In that case, the claimant contended she actually fell onto property owned by the employer, although the hearing officer held that the injury occurred at the intersection of public streets and, applying the reasoning of Matthews, "the access doctrine does not operate in this case to bring claimant's injury within the course and scope of her employment in that the site of the injury was neither located on employer's premises nor in such proximity or relation as to reasonably be considered a part thereof."

The claimant's appeal argues that the facts herein differ from those cases where no coverage was found; she points out, for example, that she was coming from an employer-owned parking garage, and she stresses that the injury would have been compensable had it occurred on those premises. She also contends that she had to cross a public street to her office no matter what route she took, citing Standard Fire Insurance Company v. Rodriguez, 645 S.W.2d 534 (Tex. App.-San Antonio 1982, writ ref'd n.r.e.) concerning inherent danger in all approaches.

Whether or not claimant's injury would have been compensable if incurred at a different location is, of course, not material to the facts at hand. (*See* Texas Workers' Compensation Commission Appeal No. 92532, decided November 13, 1992, for a discussion of the access doctrine vis a vis a parking garage injury.) In Rodriguez, the court

of appeals found compensable an injury which occurred while the employee, headed toward the parking lot, was crossing a loading dock area which the court stated was not "in the strictest sense" on the employer's premises. Relying on language used in Matthews and Lumberman's Reciprocal Association v. Behnken, 112 Tex. 103, 246 S.W.2d 72 (1922), also cited by the claimant, the court referred to an area which bore "so intimate a relation" to the employer's premises "that it can hardly be treated otherwise than as a part of the premises." The court did observe, however, that the loading dock was not a "public thoroughfare" nor a situs used by anyone but employees or those having business within the building, and that thus the risk assumed by the employee would not be one that the public would be subject to. That is not the situation in the instant case.

The claimant also contends that her employer exercised control over the premises on which she was injured, and she cites Texas Workers' Compensation Commission Appeal No. 951020, decided August 7, 1995, for the proposition that the control exercised need not be total. The hearing officer determined that the employer's activities did not constitute control over the street in question and, as the court held in Rodriguez, *supra*, whether the circumstances bring an injury within the course of employment is a fact issue. We further find Appeal No. 951020 distinguishable, even though it also involved an injury on a street. We characterized as "unique" the facts of that case, which involved a road leading into a prison facility, which constituted the only means of ingress and egress into the facility, which employees had been instructed to use, which was maintained by the employer (a prison), and on which the general public could not travel. We also noted in that case that the carrier did not appeal the hearing officer's findings concerning the control exercised by the employer.

Finally, the claimant contends that the hearing officer failed to include critical testimony in her summary of evidence. We have held that the summary of evidence is a necessarily truncated version of the evidence, and it is not error if the hearing officer does not set forth every piece of evidence adduced at the CCH, so long as it reasonably reflects the record. Texas Workers' Compensation Commission Appeal No. 92140, decided May 20, 1992; Texas Workers' Compensation Commission Appeal No. 93791, decided decided October 18, 1993. Upon our review of the record, we do not find that the hearing officer ignored any evidence or failed to adequately review the record before him.

Based upon the foregoing, the decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge