APPEAL NO. 980924

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 4, 1998. With regard to the issues at the CCH, he determined that the respondent's (claimant) injury was in the course and scope of employment and that she sustained a compensable injury on _____. The appellant (carrier) appeals, seeks a reversal of the decision and argues the claimant's alleged injury did not occur in the course and scope of her employment with (employer). The claimant responds and seeks an affirmance of the decision.

DECISION

We affirm.

The claimant testified at the CCH that on (day before the date of injury), she was an airline flight attendant for the employer; was based at the (city 1 airport); was in (city 2), on a layover; stayed overnight at a hotel in city 2 and on the morning of _____, awoke with multiple insect bites on her body. She worked on the scheduled return fight to city 1 airport and stayed in city 1. On September 3, 1997, a physician's assistant, Ms. E, noticed multiple discrete lesions on the claimant's trunk and legs, diagnosed a "bite of nonvenomous arthropod," prescribed medication and returned her to regular-duty work. The claimant stated that, while she was not required to stay at the hotel in city 1 she stayed at, it was the only hotel the employer would reimburse her for. A printout of her schedule reflected that on the evening of (day before the date of injury), she was "SKD ON-DUTY" or "scheduled on duty" for the 10.14 hours she was scheduled to be in city 2. She testified that she was paid for the 10.14 hours she was in city 2 and that during that time the employer could call her and revise her schedule. In a signed statement, one of the employer's airline captains, Capt. H, stated the claimant would not have stayed in the hotel but for her layover.

The issues herein are whether an employee, who is staying in lodging while traveling on behalf of her employer, was in the course and scope of her employment and sustained a compensable injury when she suffered an insect bite injury while in a hotel room bed. A compensable injury is one that "arises out of and in the course and scope of employment." Section 401.011(10). Generally, an employee's activity is in the course and scope of employment if it is "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." Section 401.011(12). An employee's activity may be in the course and scope of her employment if it is conducted on premises other than that of the employer. *Id.*

With regard to the 1989 Act's definition of "compensable injury," one commentator stated that:

> An employee whose work involves travel away from the employer's premises is in the course of employment continuously during the trip, except when a distinct departure on a personal errand is shown. Injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually compensable. [Emphasis added.]
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> PHILLIP HARDBERGER, TEXAS WORKERS' COMPENSATION TRIAL MANUAL, p. 11-4 (Parker-Griffin Publishing 1991).

Although the 1989 Act's definition of "course and scope of employment" differs slightly from the applicable definition under the predecessor statute,[1] cases decided under that law are instructive when analyzing whether an employee was in the course and scope of her employment. Although an employee's injury in and around a hotel stay was usually considered compensable under the predecessor statute, the analysis of when such injuries were compensable was quite detailed.

In North River Insurance Co. v. Purdy, 733 S.W.2d 630 (Tex. App.-San Antonio 1987, no writ), the employee was staying in a hotel on a business trip, an intruder attempted to enter the window of his hotel room and he was injured while pushing the intruder out of the window. The court specified that "[t]he test for determining whether an injury was received during the course of employment when the injury was suffered by an employee whose employer requires him to travel is whether the injury 'has its origin in a risk created by the necessity of sleeping or eating away from home. . . .'" *Id.* at 632, 633, citing Shelton v. Standard Insurance Co., 389 S.W.2d 290, 293 (Tex. 1965). It ruled it was implicit in the employer's sending the employee to another city that the employee would have to seek shelter, and therefore, the employee's activity was in the course of his employment. In Purdy, *supra*, the court stated that the employee must then show the activity in question was "of a kind and character that had to do with and originated in the employer's work." 733 S.W.2d at 633. It adopted the "positional risk test" and reasoned that "the risk that Purdy would sustain an injury while staying in the motel room is reasonably incident to the conduct of his employer's business." *Id.*

In Aetna Casualty & Surety Co. v. Orgon, 721 S.W.2d 572 (Tex. App.-Austin 1986, writ ref'd n.r.e.), an employee who was on a business trip was shaving in a hotel room bathroom and injured himself when a water glass shattered in his hand. The employee argued that his shaving routine was different than at home and the court, in affirming a

[1] An "injury sustained in the course and scope of employment" included "injuries of every kind or character having to do with and originating in the work, business, trade or profession of the employer received by an employee while engaged in or about the furtherance of the affairs or business of his employer whether upon the employer's premises or elsewhere." TEX. REV. CIV. STAT. ANN. Art. 8309 §1 (Vernon Pamph 1992), *now repealed* (predecessor statute).

judgment for the employee, adopted the "continuous coverage principle." *Id.* at 575. It held that "[b]ut for the business-related necessity of sleeping overnight in an out-of-town hotel room, Orgon would have awakened on the day in question in the comfort and security of familiar surroundings; he would have been unhurried; and he would have used a paper cup to get his usual drink of water." *Id*.

We have considered employees' injuries in the vicinity of their hotel rooms while out of town on business trips, but have not considered an injury while an employee was inside her hotel room. Our cases dealing with injuries near hotels considered exceptions to compensability inapplicable herein, including the personal animosity exception to the compensable injury definition,[2] the transportation exceptions to the course and scope of employment definition,[3] and the ordinary disease of life exception to the occupational disease definition.[4] We have also dealt with injuries involving insects but those cases were decided considering the act of God exception to the compensable injury definition[5] or the adequacy of the evidence.[6]

In considering the above-referenced authorities and commentary, we conclude that the claimant was in the course and scope of her employment while staying in the hotel in city 2. The hearing officer relies "on all the other attendant circumstances" to determine that she was in the course and scope of her employment, including the employer's requirement for her to stay at the hotel in city 2, the traveling nature of the airline business and the fact she was "on call" when the injury occurred. The contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as

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[2]In Texas Workers' Compensation Commission Appeal No. 94868, decided August 18, 1994, the employee was battered near his hotel while returning from eating at a nearby restaurant and we affirmed a hearing officer's determination that he was in the course and scope of his employment. *See* Section 406.0329c).

[3]In Texas Workers' Compensation Commission Appeal No. 94961, decided September 1, 1994, an employee contracted food poisoning from food she consumed in an automobile, while parked on the side of the road, and we held that the alleged injury was not, as a matter of law, in the course and scope of the employee's employment. In Texas Workers' Compensation Commission Appeal No. 950973, decided July 31, 1995, the employee was staying in a hotel away from home and was injured in a motor vehicle accident on the way to another town to eat at a restaurant and we reversed the decision that the employee was in the course and scope of his employment and rendered a decision that he was not in the course and scope of his employment. *See* Section 401.011(12)(B).

[4]Appeal No. 94961, *supra*. *See* Section 401.011(34).

[5]In Texas Workers' Compensation Commission Appeal No. 951583, decided November 9, 1995, we reversed the hearing officer's decision and rendered a decision that the employee's bee sting was a compensable injury. *See* Section 406.032(1)(E).

[6]In Texas Workers' Compensation Commission Appeal No. 971508, decided September 11, 1997, an employee who was an airline flight attendant was alleged to have contracted a bacterial infection from eating food in a restaurant on a layover and we affirmed the hearing officer's decision that the employee did not show she sustained an occupational disease. In Texas Workers' Compensation Commission Appeal No. 93885, decided November 15, 1993, we affirmed a decision that the employee failed to meet his burden of proof that Lyme disease was cause by an insect bite sustained in the course and scope of employment.

well as of the weight and credibility that is to be given the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We substitute our judgment for that of the hearing officer only when his determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We conclude that the course and scope of employment determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain *supra;* Section 401.011(12).

This leaves the question of whether the activity of sleeping in the hotel room's bed and sustaining an injury while in bed arose out of the claimant's employment. Like other classes of employees, an airline flight attendant must show the activity in the course and scope of her employment also arose out of the employment. In Texas Workers' Compensation Commission Appeal No. 960313, decided April 3, 1996, the employee was a flight attendant on an out-of-town layover and was, under our previous analysis, in the course and scope of her employment while on the layover. The employee therein went to a national park for recreation and injured herself falling down a mountain. In that decision, we affirmed the hearing officer's determination that the employee's activities at the park did not arise out of her employment. The employee was not furthering the affairs of the employer when she was engaged in the recreational activity of visiting the park, despite the fact that she was on a layover. However, the claimant herein cannot be said to have diverged from an activity that was "of the kind or character that has to do with and originates from the work, business, trade, or profession of the employer and that is performed by an employee while engaged in the furtherance of the affairs or business of the employer." Section 401.011(12). Therefore, we conclude that the determination that the claimant's injury arose out of her employment as an airline flight attendant is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *Id.* Cain, *supra*.

The decision is not against the great weight and preponderance of the evidence and, therefore, we affirm. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (Tex. 1951).

Christopher L. Rhodes
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge