APPEAL NO. 000229
AND 000230

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 January 11, 2000. The issues at the CCH were the same in both cases, the claims having arisen out of the same motor vehicle accident (MVA) on _____. The issues in both cases were whether the respondents, (claimant 1) and (claimant 2), sustained a compensable injury on _____; whether they had disability; and whether the claimants reported an injury to the employer on or before the 30th day after the injury, and if not, did the employer have actual knowledge of the injury. The hearing officer determined that each claimant sustained a compensable injury on _____; that each claimant timely reported an injury to the employer; and that, with regard to claimant 1, she had disability from _____ (erroneously stated to be from _____, in a conclusion of law), through the date of the hearing and, with regard to claimant 2, she had disability from _____ (erroneously stated to be from _____, in the Decision section), through the date of the hearing. Clearly typographical errors, we modify the dates shown as _____, to reflect the date _____. The appellant (carrier) appeals each case, urging error in findings of fact and, essentially, arguing that at the time of the MVA on _____, in which each claimant was injured they did not meet the burden of proving they were in the course and scope of their employment and that the injuries arose out of the employment. The carrier also claims error in the hearing officer considering testimony of claimant 2 regarding notice of injury outside of the answer in responses to interrogatories and in determining that the claimants gave timely notice since the answers to the interrogatories relied on actual knowledge by the employer. Predicated on the argument that the claimants did not sustain a compensable injury, the carrier urges that they cannot have disability under the 1989 Act. The claimants respond, through counsel, that the hearing officer correctly determined, and is supported by sufficient evidence and the law, that the claimants were injured in the course and scope of their employment; that they gave timely notice; and that they had disability.

DECISION

Affirmed.

The Decision and Order of the hearing officer adequately and fairly sets forth the evidence in this case and is not largely in dispute. Briefly, the claimants in this case were part of a three-member audit team sent to a city more than 50 miles from the employer's home office (mileage pay occurs beyond 50 miles). They were to perform audits at two different gas/convenience store locations in that city. While performing the audit at the first location, the computers went down and the client/customer instructed them to stop that audit, go to the second audit location, return later, and suggested they grab lunch on the way as it was going to be a long day. Although the auditors were not in agreement, they followed the directions and proceeded in one of the auditors' automobiles toward the

second location. As they had not eaten for over seven hours, they saw the only fast food restaurant in the area and pulled off the highway to obtain fast food to eat on the way to the second location. As they were pulling out of the fast food parking lot to the access road, they were broadsided by a truck and sustained various injuries.

The owner of the employer testified that his wife got a call from the client/customer advising that an MVA occurred and subsequently authorized a rental car to get them home. He also indicated that claimant 2 had called and left a message about the MVA and that he saw the claimants at his home on _____; was told the particulars about the accident; and offered to let them to go to his doctor, which they did. His doctor reported to him that they had injuries that would keep them off work. He stated that he did not think it was a work-related injury case since they had stopped to get something to eat and that they did not tell him it was a work-related injury. He stated that it was not out of the ordinary for them to grab their food while they could and eat on the run, and indicated he had paid for their lunches on occasion. He stated that auditors were paid hourly while actually auditing and paid mileage while traveling. He acknowledged that they were in the city on business for the employer.

Claimant 1 testified that there was no set lunch period and that it was not unusual to eat on the road and be paid mileage and that she had done so with the employer in the past. She stated that she told the employer about the MVA, that she assumed he would feel it was work related as they were out of town on his business, that she went to the employer's doctor, and that she was told to file against her insurance company for the MVA. She states that she was taken off work because of her injuries and has not been released. She acknowledged the convenience store where they audited had snack-type food, although she did not eat that type of food.

Claimant 2 testified that when the client/customer instructed them to stop the audit and go to the second location, the client/customer suggested they grab something to eat and get there as soon as possible because their representative would be there. Claimant 2 also stated that she drove to the hospital where one of the auditors had been taken with the client/customer. She stated that she called on the client/customer's cellular phone to the employer's wife and told her about the MVA and gave a first report of injury. She acknowledged that in answer to interrogatories she might have said she talked to the employer rather than his wife. She also stated that she talked to the employer on _____ and, subsequently, went to the employer's doctor. She states that she is not able to work and that her injuries included a bulge in her cervical area, a vision and headache problem, and a foot injury.

The wife of the employer testified that she got a call on the day of the MVA, that she did not talk to claimant 2, but that she knew claimant 2 was injured in the MVA in the city where the audits were being done. She stated that she recalled a conversation on the day of the accident with someone from the hospital inquiring about insurance and being told by this person that it was being listed for insurance purposes as workers' compensation.

Regarding the compensability of the injury, the hearing officer found that, under the facts and circumstances, the claimants, on out-of-town business, stopped at a restaurant on the road to the second job site and obtained food to eat and that the claimants had not deviated for a personal errand or pleasure from their travel to the second business site when the injuries occurred. Thus, the hearing officer determined that the claimants sustained injuries on _____, that arose out of and were in the course and scope of their employment. Deviating from the direct route of travel while in a business travel situation to accomplish a personal errand or for personal, nonwork-related, activity may well result in removing one from the course and scope of his or her employment. Texas Workers' Compensation Commission Appeal No. 961565, decided September 25, 1996; Texas Workers' Compensation Commission Appeal No. 950057, decided February 24, 1995. These cases involve a deviation from the direct route for personal reasons while traveling in the employer's home area. However, even when a deviation for food has occurred, once the employee is returning to the appropriate route of travel, the employee is in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 982459, decided December 2, 1998 (Unpublished). Different considerations come into play when an injury occurs during travel out of town on business in determining whether a significant deviation has occurred removing a claimant from course and scope. Texas Workers' Compensation Commission Appeal No. 991364, decided August 12, 1999; Texas Workers' Compensation Commission Appeal No. 950973, decided July 31, 1995. In Appeal No. 950973, although the claimant was out of town on business and would likely have been covered by workers' compensation in obtaining an evening meal close to his lodging, he chose instead to drive some 15 miles away, was involved in an MVA, and was denied coverage.

Under the factual setting before him in this case, the hearing officer determined that the claimants did not deviate for a personal errand or pleasure from travel to the second job location. From our review of the record, there is sufficient evidence to support this finding. It could reasonably be inferred that the claimants were furthering the interest of the employer at the time of the accident, that is, there was a somewhat stressful situation where an audit in progress had to be stopped temporarily and later reaccomplished the same day; the claimants were under direction to complete both audits that same day; they were instructed to leave the first location and get to the second location as soon as possible with the suggestion that they grab some food on the way to the second location as it was going to be a long day; the claimants accommodated the rushed situation and stopped to pick up food to eat on the way from a fast food restaurant on the direct route to the second location; and the claimants did not give any indication of embarking on a personal or recreational errand as opposed to the necessity of obtaining something to eat at the time of the MVA and appeared to be acting on behalf of the employer's business interests throughout the course of the day leading up to the time of the accident and injuries. Texas Workers' Compensation Commission Appeal No. 992479, decided December 20, 1999. We would be hard-pressed to conclude that the great weight and preponderance of the evidence is so against the findings of the hearing officer, under these facts and circumstances, as to be clearly wrong or unjust. Employers Casualty Company v.

Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). We affirmed the decision and order regarding the sustaining of a compensable injury by each of the claimants.

Regarding notice of injury, there was some conflict in the evidence as to who was notified at the outset, the employer or his wife. However, the evidence clearly supports the fact of notice of the accident and the injuries while the claimants were on a business trip for the employer. We conclude that there is sufficient evidence to support the finding that the claimants gave sufficient notice of a compensable injury to the employer no later than the meeting of _____. Further, there is evidence that tends to support actual knowledge, that is, that the employer was aware of facts that could reasonably lead to a compensable injury being found under the circumstances. We do not believe that a misconception by either party as to the legal consequences of the brief stop to obtain food, a legal consequence still in dispute on this appeal, precludes having sufficient information to find actual knowledge. Texas Workers' Compensation Commission Appeal No. 950017, decided February 17, 1995. *Compare* Texas Workers' Compensation Commission Appeal No. 950215, decided March 30, 1995. In any event, we find the evidence sufficient to support the finding of the hearing officer that the claimants timely reported the injury to the employer and uphold his decision and order on this issue.

The carrier's appeal on disability centers on the argument that there cannot be disability without a compensable injury. Having upheld the determination of a compensable injury being sustained by the claimants, and otherwise finding sufficient evidence to support the hearing officer's finding of disability, we affirm his decision and order regarding disability.

Finally, the carrier urges that the testimony of claimant 2 should not be allowed beyond what was in her answer to interrogatories, specifically that she reported her injury to the employer's wife, as opposed to the employer. While there appears to be some inconsistency in her testimony and her answer to the interrogatory where she indicated she reported the injury to the employer, she stated that she may have put that down because he was the owner of the company. In any event, this was a matter for the hearing officer to resolve in weighing the evidence and we do not find error in his refusal to exclude claimant 2's testimony on this matter. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge