APPEAL NO. 001700

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 on June 29, 2000. The hearing officer determined that the respondent (claimant) had sustained a compensable injury on _____, and had disability resulting from that injury from October 26, 1999, through the date of the hearing. The appellant (carrier) has appealed the compensability and disability determinations, contending that the claimant's injury was an idiopathic fall and that there was no disability because there was no compensable injury and because the medical evidence was insufficient to support the determination of disability. No response was filed by the claimant.

DECISION

Affirmed on other grounds.

The undisputed facts of the case are set out in the hearing officer's decision and order. The claimant worked as a clerk for employer and was on her way to her car on _____, when her knee twisted as she was going down a set of stairs on the outside of employer's building. At the time of the injury, the claimant was on break, going to check her car to determine if she would need to have a coworker help start the car after work.

The carrier argued at the hearing, as it did on appeal, that the claimant's knee injury was not compensable because it was the result of an underlying idiopathic condition resulting from a motor vehicle accident in 1995.

It is axiomatic that the employer accepts the employee as he is when he enters employment. Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.-Dallas 1967, no writ). An incident may indeed cause injury where there is a preexisting infirmity where no injury might result to a sound employee, and a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W.2d 412 (Tex. 1963). We see no reason to retreat from that position in instances of life events during the tenure of an employee with an employer which tend to make the employee more susceptible to injury.

The hearing officer considered the carrier's argument and rejected it, finding that using employer's stairway caused the injury. That holding is consistent with our decision in Texas Workers' Compensation Appeal No. 992193, decided November 17, 1999, wherein we stated:

> [C]laimant was climbing stairs and thus was doing more than "merely walking" at the time of the injury. Additionally, the great weight and preponderance of the evidence shows that claimant's injury was not solely caused by a preexisting idiopathic condition. *See* Bush [Director, State Employees Workers' Comp. Div. v. Bush, 667 S.W.2d 559 (Tex. App.-Dallas 1983, no writ)]; Garcia v. Texas Indemnity Insurance Co., 209 S.W.2d 333 (Tex. 1948).

However, the burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas, 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). In this case, the hearing officer found that the claimant's injury was sustained in the course and scope of employment by virtue of the access doctrine, citing Texas Workers' Compensation Appeal Decision No. 951020, decided August 7, 1995. The claimant's injury to her left knee occurred on stairway from employer's place of business to the parking lot where the employees parked as she was going to her car to make sure it would start. The claimant then intended to return to work.

We have previously held that the access doctrine applies only in instances where the employee is either coming to or leaving the work premises. In a similar case, Texas Workers' Compensation Appeal Decision No. 971607, decided September 30, 1997, the Appeals Panel held:

> What we find as legal error in the application of the access doctrine to the case we now consider derives from the uncontested fact that the claimant was not in the act of or intending to leave the premises of the employer. By her own testimony, she was only going to the parking lot to check the condition of her vehicle for the trip home at the end of her shift some three hours later. This was not a case of accessing, *i.*e., coming to or going from, the employer's premises, but of activity solely on the premises. Thus, the traditional dual requirements of the definition of "course and scope of employment" must be applied to determine whether her injuries were compensable: first, the injury must be of a kind or character that had to do with or originated in the employer's work, trade or profession; and second, the injury must have occurred while the claimant was engaged in or about the furtherance of the employer's affairs or business. Texas Employers Insurance Assn. v. Page, 553 S.W.2d 98 (Tex. 1977). While the first prong of this test was met, the second prong was not met.

The reasoning regarding the access doctrine set forth in Appeal No. 971607 has been adopted and followed in Texas Workers' Compensation Appeal Decision No. 991158, decided July 15, 1999 (employee injured on the loading dock stairs while at her place of employment prior to her scheduled shift in order to verify her work schedule for that day), and Texas Workers' Compensation Appeal Decision No. 992215, decided November 8, 1999 (employee on break slipped and fell in the employee parking lot while checking the windows of her car due to an impending storm). In each of those cases, the Appeals Panel has determined that injuries sustained were not compensable under the access doctrine. The hearing officer's reliance on that doctrine in finding that the claimant had sustained a compensable injury in this matter was in error.

The Appeals Panel may affirm a determination of compensability on any grounds supported by the record. Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 00573, decided May 1, 2000. We have a duty to apply the applicable law to the issues raised, whether or not

the parties cited appropriate cases or made certain legal arguments. We find that the claimant was within the course and scope of her employment at the time of her injury.

In this case, the claimant was going to check to see if she would need assistance in starting her car, when she was injured. In Texas Workers' Compensation Appeal Decision No. 971607, decided September 30, 1997, and Texas Workers' Compensation Appeal Decision No. 992215, decided November 8, 1999, we have held that employees so engaged were involved in a personal errand and were outside the course and scope of their employment. To the extent that those cases conflict with our decision in this case, they are overruled. We decline to follow them and anticipate that the reasoning set forth in this decision will be followed by panels in the future.

In Yeldell v. Holiday Hills Retirement and Nursing Centers, Inc., 701 S.W.2d 243 (Tex. 1985), the Texas Supreme Court considered a claim for compensation by a nurse who was injured as she was hanging up from a personal call and the telephone cord became entangled, overturned a coffee urn, and spilled hot coffee on her. The Court held that :

> In this electronic age, telephonic communication is a necessity. Under appropriate circumstances, making a personal telephone call during working hours may be as essential as a rest period or refreshment break. In particular, a parent's telephone call to a minor child at bedtime is as reasonably necessary to a worker's well-being as quenching one's thirst or relieving hunger.

In an earlier case, Texas General Indemnity Company v. Luce, 491 S.W.2d 767, 768 (Tex. Civ. App. - Beaumont, 1973, writ ref'd), the Court of Appeals affirmed worker's compensation coverage for an employee who had gone to pick up her paycheck, then went behind the serving line to speak with her fellow employees. The Court of Appeals held:

> The law must be reasonable. . . . We are unable to apply the principle of deviation from employment so rigidly as to ignore the common habits of most people.

We therefore hold that an act which is reasonably anticipated to be performed by an employee, performed while on the premises, and which does not deviate from the course and scope of employment to the extent that an intent to abandon employment can be inferred, remains within the course and scope of employment. We find that an employee's checking on her vehicle to determine if assistance in starting the vehicle after the end of the day will be required is such an act and that, in this instance, the claimant was within the course and scope of her employment at the time of her injury. We do not hold that every act which an employee may engage in on the premises, even if engaged in during an approved break, will remain within the course and scope of employment.

We therefore affirm the hearing officer's Finding of Fact #2 that the claimant sustained the injury to her left knee in the course and scope of employment and Conclusion of Law #3 that the claimant sustained a compensable injury on _____.

The carrier asserts that the claimant had no disability first because there was no compensable injury and secondly because the medical evidence did not prove disability at all. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). In her discussion of the evidence, the hearing officer notes that the claimant was taken off work by her treating doctor on October 25, 1999, that the treating doctor has recommended surgery, and that the claimant had not been released to return to work by her treating doctor as of the date of the hearing. Those determinations are amply supported by the evidence in the record.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1997, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App. - El Paso 1991, writ denied). Only were we to conclude, which we do not in this case, that the hearing officer's determination were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

Accordingly, having found that the hearing officer's determination that the claimant sustained a compensable injury on _____, we further affirm the hearing officer's decision that the claimant had disability resulting from the compensable injury beginning

on October 26, 1999 and continuing through the hearing.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Judy L. Stephens
Appeals Judge