APPEAL NO. 012248
FILED NOVEMBER 7, 2001

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 July 5, 2001. With regard to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and that the claimant had disability beginning on April 24, 2001, and continuing through June 4, 2001. In Texas Workers' Compensation Commission Appeal No. 011648, decided August 29, 2001, the Appeals Panel remanded the case back for the appellant (self-insured, also referred to as the carrier) to provide a street address where personal service of process can be effectuated. That has been done. The carrier has resubmitted its request for review.

The carrier appealed the hearing officer's decision, arguing that the hearing officer erred in finding and concluding that the claimant sustained a compensable injury, and that the claimant had disability. The carrier argues that the "access doctrine" exception under the "coming and going" rule, does not apply. The file on remand does not contain a response from the claimant.

DECISION

Affirmed.

The claimant testified that she was employed as a "financial screener" for a university health facility (employer) and that she parked her vehicle in the employer's employees' parking lot. By memorandum dated October 21, 1999, the employer notified the claimant (and others) that due to construction of the employer's building and the erection of a tower to an adjacent medical facility, the employees' parking lot would be relocated to the adjacent medical facility parking garage, effective November 1, 1999. By contract, the employer leased 209 spaces in the adjacent medical facility parking garage. The contract states that:

> Until further notice, [employer] shall deduct the equivalent amount of two hundred and nine (209) spaces from the total monthly rate owned to [adjacent medical facility] in exchange for [adjacent medical facility's] temporary use of the [employer's] visitor/patient lot, which forced [employer] to change it's employee parking lot to a visitor/patient parking lot.

By contract, the claimant was issued an identification and parking access card and parking sticker by the adjacent medical facility to park at their adjacent medical facility parking garage, and the employer remitted a monthly parking payment, which was deducted from the claimant's paycheck, to the adjacent medical facility. The claimant testified that there were two parking garages, one for patients only, located next to the hospital, and the other parking garage for "employees only" where she parked her vehicle. The claimant testified

that the adjacent medical facility parking garage is located about one-third of a mile from her building, and it takes her approximately 1 to 15 minutes to walk from the adjacent medical facility parking garage to her office. On _____, the claimant sustained an injury to her foot when she slipped and fell going down a flight of stairs in the adjacent medical facility parking garage on her way to her employment.

The issues in this case are whether the claimant sustained a compensable injury and whether the claimant had disability. The hearing officer relied on the "access doctrine" in making her determination regarding compensability. The hearing officer cited Standard Fire Insurance Co. v. Rodriguez, 645 S.W.2d 534 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.), in which the court held that the "access doctrine" further contemplates that the employment include:

> not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employers' premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course and scope of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance. In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached. *Citing* Texas Employers' Insurance Association v. Lee, 596 S.W.2d 942 (Tex. Civ. App.-Waco 1980, no writ); Texas Employers' Insurance Association v. Boecker, 53 S.W.2d 327 (Tex. Civ. App.-Dallas 1932, writ ref'd).

The carrier argues that the access doctrine does not apply to the claimant's case because: (1) the claimant's employer does not own the parking garage; (2) the employer does not control or maintain the parking garage; (3) the employer does not furnish the employee parking privileges in the parking garage; (4) the employer does not require its employees to use the parking garage; and (5) the employer's employees are not the only users of the parking garage.

In support of its argument, the carrier relies on Kelty v. Travelers Ins. Co., 391 S.W.2d 558 (Tex. Civ. App.-Dallas 1965, writ ref'd n.r.e.), in which an employee slipped and fell upon an icy sidewalk some 10 to 12 feet from an entrance to her employer's building. The employer leased the building and "assumed responsibility for proper maintenance of the sidewalk" by repeatedly cleaning and removing ice from the sidewalk. The court, citing case law concerning the access doctrine, reversed a summary judgment for the carrier, and held that the employer "assumed the duty of providing a safe means of ingress and egress to and from the premises" where the claimant's work was to be performed.

In the case at bar, the carrier argues that since the employer did not own, control, or maintain the adjacent medical facility parking garage, the "access doctrine" does not apply. However, the evidence supports that the adjacent medical facility parking garage was an intended place by the employer for use as a means of ingress and egress to and from the actual place of the employees' work as illustrated by the contract between the employer and the adjacent medical facility. The Kelty court stated that access areas that "are so closely related to the employer's premises as to be fairly treated as part of the employer's premises" are an exception to the "coming and going" rule. The hearing officer determined that the employer had "implied that its employees use the parking garage owned" by the adjacent medical facility and the evidence of a contract sufficiently supports the hearing officer's determination.

The carrier also relies on Texas Workers' Compensation Insurance Company v. Matthews, 519 S.W.2d 630 (Tex. 1974), in which the employee was injured when she fell in a public street while going to work "because of a constriction barrier [placed] adjacent to her employer's building by an independent contractor of her employer." The Matthews court references cases which have formed the access doctrine as a two-prong test as follows:

> 1. [Whether] 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,
>
> 2. 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.

Applying the access doctrine two-prong test, the Supreme Court reversed the lower court's decision and held that the employer had not attempted to exercise any control over the street, and the crosswalk formed no part of the premises. The Supreme Court, in discussing Kelty, stated "that the access exception to the 'going to and from' rule had been carried as far as it reasonably could be, without an amendment to the Workmen's Compensation Act."

In the case at bar, the carrier argues that the access doctrine does not apply to this case because the employer did not furnish parking privileges or require its employees to park at the adjacent medical facility parking garage. The hearing officer determined that the employer "implied that its employees use the parking garage owned by [the adjacent medical facility]." The contract and the employer's memo and newsletter in evidence imply that the employer encouraged and directed the claimant to park at the adjacent medical facility parking garage. The hearing officer opined that:

> A memo dated 10-21-99 stated ". . . employees parking in the [employer's parking lot] will be relocated to [the adjacent medical facility parking garage]." The memo went on to state "Relocation of all employees is effective November 1, 1999, therefore, all employees will need to go to the [adjacent

medical facility] security . . . to get your [adjacent medical facility] Id/parking access card."

The carrier also argues that the adjacent medical facility parking garage was accessible to "others." The claimant and the employer's representative testified that the parking garage was for employees only and some patients of the adjacent medical facility. The employer's representative testified that patients from neurology and psychology that had mechanical and physical problems could park in the adjacent medical facility parking garage by pressing a button on the access panel and a security guard at the adjacent medical facility would open the gate. In addition, the employer's representative testified that these patients who parked at the adjacent medical facility parking garage were patients of the employer.

In applying the two-prong test, the evidence supports the first prong that the employer intended that the adjacent medical facility parking garage was a particular access route or area to be used by the claimant in going to and from work. In applying the second prong, the adjacent medical facility parking garage was so closely related to the employer's premises as to be fairly treated as a part of the premises, as evidenced by the contract and the employer's newsletter and memo, and the fact that parking was restricted to employees only and some of the employer's patients. The evidence does not support the carrier's argument that the adjacent medical facility parking garage is excluded as an exception under the "access doctrine," since the adjacent medical facility parking garage was contracted for the convenience of the employer's employees and the premise is not equivalent to a "public street" or accessible to the general public.

We note that the Kelty case is fact specific to the employer as tenant of the premises exerting control over a public "sidewalk" and the Matthews case is fact-specific to the employer exercising control over "public streets." The Appeals Panel, in referencing cases regarding the exceptions to the "coming and going" rule, has held that the access doctrine applies to cases that show that access has to be closely related to the employer's premises, to overcome the exclusion from course and scope of employment. *See* Texas Workers' Compensation Commission Appeal No. 91036, decided November 15, 1991. The Appeals Panel has held in a "parking garage" case that where the claimant fell in a parking garage that was not owned, maintained, or controlled by the employer, and the parking garage "was not in such proximity in relation to be, in practical effect, part of the employer's premises," the injury did not occur in the course and scope of employment. *See, generally*, Texas Workers' Compensation Commission Appeal No. 961742, decided October 11, 1996. The evidence in this case supports the hearing officer's determination that the access doctrine applies.

The hearing officer did not err in determining that the claimant sustained a compensable injury on _____, and that the claimant had disability beginning on April 24, 2001, and continuing through June 4, 2001. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for

the hearing officer, as trier of fact, to resolve any 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). Nothing in our review of the record indicates that the challenged determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb the hearing officer's determination on appeal. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Regarding the carrier's appeal of the hearing officer's determination that the claimant had disability, Section 401.011(16) provides that disability is the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. The hearing officer was persuaded by the claimant's testimony and the medical records in evidence that the claimant sustained a work-related injury on _____, and the medical evidence shows that the claimant was taken completely off work because of that injury beginning April 24, 2001, and continuing through June 4, 2001.

Accordingly, the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

RON JOSSELET
EXECUTIVE DIRECTOR
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR.
STATE OFFICE BUILDING
6TH FLOOR
AUSTIN, TEXAS 78701.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I dissent because I do not believe that the hearing officer correctly analyzed and applied the "access doctrine" exception to the "coming and going" rule and because I view the majority's opinion to be an unwarranted extension of the "access doctrine" exception.

The evidence reflects that the claimant and her fellow employees had the option of parking under a nearby overpass, finding limited street parking, or parking in an employer-owned parking facility; that the claimant exercised the latter option; that this facility became unavailable due to construction; and that the employer made arrangements to obtain some parking spaces in the parking facility of another employer and advised the employees paying for parking, including the claimant, that they could pay for a parking slot at the other facility. From this evidence, the hearing officer finds that the employer "implied that its employees use" the other facility of the other employer and concludes that the claimant's injury in the facility of the other employer occurred in the course and scope of her employment. While the hearing officer's decision does contain a limited discussion of the access doctrine, the hearing officer does not analyze the evidence in terms of the complete access doctrine rule but rather appears to be stating that the employer required the employees to use the other employer's facility. While the evidence certainly supports a position that the claimant and other employees who desired to pay for parking could do so at the other employer's facility, thanks to the employer's arrangements, they were not required to do so. Accordingly, the access doctrine test must be applied here to resolve the issue of whether or not the claimant was "going to" work or was already on her employer's premises when she fell in the other employer's parking facility.

Both the Texas courts and the Appeals Panel have considered cases involving injuries sustained by employees at parking facilities in the context of the access doctrine. *See, e.g.* Turner v. Texas Employers Insurance Ass'n., 715 S.W.2d 52 (Tex. App.-Dallas 1986, writ ref'd n.r.e.); Bordwine v. Texas Employers' Ins. Ass'n., 761 S.W.2d 117 (Tex. App.-Houston [14th Dist.] 1988, writ den.); Texas Workers' Compensation Commission Appeal No. 91036, decided November 15, 1991; Texas Workers' Compensation Commission Appeal No. 94183, decided March 30, 1994; and Texas Workers' Compensation Commission Appeal No. 961742, decided October 11, 1996. These cases uniformly reflect that there are two prongs or elements to the access doctrine, as stated by the Bordwine court at page 119:

> This doctrine [access doctrine] expands the scope of employment to cases where the employer has evidenced an intention that the particular access route or area to be used by the employee is going to and coming from work, and where such route or area is so closely related to the employer's premises as to be fairly treated as a part of the premises.

The hearing officer in the case we consider addresses only the first prong or element of the access and nowhere addresses the second. It is simply not sufficient that the employer have evidenced an intention that a particular area be used by the claimant.

It must also be established that the route or area be so closely related to the employer's premises as to be fairly treated as a part of those premises. The only evidence bearing on this element of the access doctrine is the claimant's testimony that the parking garage where she was injured in one-third of a mile from the employer's premises. The record does not indicate whether there are any public streets or other property between the employer's premises and the parking garage where the claimant fell.

Accordingly, in my opinion, the claimant failed to meet her burden of proving that her injury fell within the ambit of the access doctrine and the hearing officer committed reversible error in failing to consider the second prong or element of the access doctrine exception. For this reason, I would reverse and render a new decision that the claimant's injury was sustained in the course and scope of her employment because she was still "going to" work at the time she was injured.

Philip F. O'Neill
Appeals Judge