APPEAL NO. 042922-s
FILED JANUARY 6, 2005

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 October 6, 2004. The hearing officer resolved the disputed issues by deciding that because the appellant (claimant) deviated from her employment and was not in the course and scope of her employment, the claimant did not sustain a compensable injury on _____, and that the claimant did not have disability. The claimant appealed, arguing that the decision of the hearing officer is supported by no evidence, and/or that it is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. The claimant contends that the hearing officer improperly failed to consider that the claimant was under a temporary direction from the employer to participate in the blood drive activities. The respondent (carrier) responded, urging affirmance. The carrier argues that the temporary direction exception does not apply and that the claimant was not furthering the affairs of the employer while giving blood, and would not have returned to the course and scope of her employment until such time that she returned from the deviation.

DECISION

Reversed and rendered.

The facts of this case are largely undisputed. The claimant, a claims service representative, participated in a blood drive being held in a mobile unit just outside the employer's premises. After donating blood, the claimant walked back into the employer's building, and lost consciousness falling to the floor. The claimant sustained numerous injuries as a result of the fall.

The issue of whether the claimant deviated from the course and scope of her employment while participating in blood drive activities or was under the employer's temporary direction and in the course and scope of employment while performing those activities is not dispositive in this case.

A claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). "Course and scope of employment" means, in pertinent part, "an activity 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). In General Ins. Corp. v. Wickersham, 235 S.W.2d 215 (Tex. Civ. App.-Fort Worth 1950, writ ref'd n.r.e.), the

court stated that an injury is not compensable if received during a deviation by the employee from the course and scope of employment, but after the deviation is over, injuries thereafter received are compensable.

In the instant case, it was undisputed that the claimant's fall took place after she had returned to the employer's premises. It is also clear she returned to the employer's premises to resume her employment activity. The hearing officer states in his discussion that "the dispositive question here is whether the actions of the Claimant in participating in the blood drive up to the time she logged back in at her workstation were a significant, not incidental, departure from the course and scope of her employment as to be a deviation from employment that made the injury non-compensable." We cannot agree that the claimant's participation in the blood drive did not end until she logged back in at her workstation. The deviation ended when she returned to the employer's premises before the fall occurred.

The facts of this case are similar to the facts in Garcia v. Texas Indemnity Insurance Company, 209 S.W.2d 333 (Tex. 1948). In that case, an injured worker fell as a result of an epileptic fit. The Supreme Court addressed the issue of whether the fatal injuries in question arose out of the employment. Under the facts of the case, the employee's seizure caused him to jump into the air, striking his head on a concrete post located at the dock where the employee was waiting to unload goods. After citing case law from other jurisdictions the court wrote that "[u]nder the great weight of authority . . . we hold that Garcia's injuries arose out of his employment, because it had 'causal connection with' his injuries, either through its activities, its conditions, or its environments . . . . The post with the sharp corners . . . was a condition attached to the place of Garcia's employment; more than that, it was an instrumentality essential to the work he was waiting to do." [Citations omitted.]

The facts of the case at issue are also similar to the facts of the Wickersham, *supra*, case. In Wickersham a janitor left his place of employment, a restaurant, and went across the street to use the telephone, and then returned. Almost immediately after he went through the door of the restaurant he fell to the floor striking his head on the tile floor before starting to sweep again. The fall caused a skull fracture that resulted in death. The trial court in Wickersham found he suffered a dizzy spell and fell to the floor. The determination that the injury was compensable was affirmed on appeal because the deviation ended.

The hearing officer is the sole judge of the weight and credibility of the evidence, Section 410.165(a), and the Appeals Panel will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We find the hearing officer's determination that because the claimant deviated from her employment and was not in the course and scope of her employment, she did not sustain a compensable injury on _____, to be against the great weight of the evidence

because assuming there was a deviation, the evidence established that the deviation had ended at the time of the claimant's fall.

Accordingly, we reverse the decision and order of the hearing officer and render a new decision that the claimant sustained a compensable injury on _____.

As for the issue of disability, the hearing officer found that as a result of her injuries of _____, the claimant was unable to obtain and retain employment at wages equivalent to her preinjury wages beginning _____, through the date of the CCH. That finding was not appealed. We render a new decision that the claimant had disability from _____, through the date of the CCH.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge