APPEAL NO. 92169

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp 1992). On March 31, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. He determined that claimant, respondent herein, was in the course and scope of employment when he injured his back. Appellant asserts that respondent had deviated from furthering his employer's business to assist a friend at the time in question.

DECISION

Finding that the decision is supported by sufficient evidence of record, we affirm.

Respondent has worked for (employer) as a heavy duty diesel mechanic for six years. On (date of injury), he and two other employees helped a fourth employee, who had notified employer earlier that week that he was resigning, lift a tool box belonging to the resigning employee on to a truck that had been backed into the work area. Each mechanic furnished his own basic tools contained in a tool box that weighed from 400 to 1,400 pounds. All agreed that one worker could not lift the type tool box referred to at this hearing. The box in question has rollers on it and had been rolled next to the owner's truck so the resigning employee could take it to his new job. As the four men lifted and extended the box onto the truck bed, respondent testified that he felt his lower back "explode." The other workers helped him to a nearby table and summoned the foreman. Respondent states he doesn't remember very well what went on around him after that.

At the beginning of the hearing, after having introduced his own hearing officer exhibits, the hearing officer stated the issue to be "was claimant injured in the course and scope of employment when he injured his back lifting another mechanic's tool box at the work place." To this carrier's counsel said "[y]es, the issue is course of employment." After the hearing officer orally went though a series of possible stipulations, carrier's counsel said he could not stipulate that an injury occurred. The hearing officer then stated "[d]o you see a need to have to litigate that there was an injury?" Carrier's counsel replied "[a]t this time, no. The only issue is course and scope and there's no--there's never been an issue raised as to the existence of an injury." Thereafter a stipulation as to injury was changed to reflect agreement as to an "alleged injury," but the issue as stated earlier was never changed. In this context, respondent offered no medical data. The two other employees who helped lift the box testified but were not queried about the injury itself. One, (GD), in the context of testifying that it only took about 30 seconds to lift and load the box, did state, "[w]ell, at that time, (respondent) collapsed right there and so we tried to offer him assistance and get him sent to the hospital. And then I went back to work."

The service manager for employer, (JC), testified that he had worked for employer for 17 years. He characterized respondent as a good employee. The work area consisted of a number of stalls where mechanics worked. Hours were set by the employer and the

incident in question happened within those hours after everyone involved had been at work that day. JC said there was no question that the mechanics were employees although each worked on a commission basis--a work order would be provided an employee and he was paid a set hourly wage while working on that order. On (date of injury), respondent was at work, on an order, when the resigning employee in some manner indicated he needed help. Respondent interrupted his work under the order and stepped over to lift the tool box along with (JM), GD, and resigning employee. In answer to questions concerning whether employer had issued a work order to respondent to move the tool box, JC said "no." JC also said that tools had been carried before and that he had told some empoyees not to do that--to use a forklift instead. JC had never told respondent not to help lift a tool box. The only written policy or rule addresses lifting precautions, such as getting assistance on heavy things, which JC said respondent did not violate. No one directed respondent to help load the tools and no one directed him not to load the tools. JC said that while respondent and others were loading the tool box they were not being paid, and he said they were not furthering the job of the employer. But, he also said that the lifting of the tools was "acceptable conduct" at the time.

GD and JM were the other two mechanics who helped load the tool box and were called to testify by appellant. They agreed that they had been given no work order to move tools, were not being paid to do so, and had not been told to do so. Both stated that they had helped other mechanics move an object or "hold a wrench," knowing that in helping out he would be paid nothing since only the other mechanic had the work order. Both had also done work for the employer that was not on a work order and for which they were not paid. GD testified that he had assisted in moving a tool box before and had not been told not to do that. JM was asked "[a]nd if you were to turn down other employees when they ask for a hand, how--how much help do you think you'd get when you need a hand?" JM answered, "None." GD also said he used his own tools. He was asked, "[d]o you use those to do the work of the shop?" He replied, "[y]es, sir. Takes tools to make money."

Respondent stated he had helped others unload their tools when they began to work for employer and load them when they left. He said that the resigning employee had helped him before "to get the jobs done." He had not been told not to assist others. He did not dispute that a forklift should be used, when available, but did not think that the availability of a forklift had been questioned by resigning employee or either of the other two mechanics who assisted. Respondent said he hurt his back.

Appellant raised 10 points of error which will be singly answered later in this opinion. First, the issue as stated at hearing will be addressed: "was Claimant injured in the course and scope of employment when he injured his back lifting another mechanic's tool box at the work place." Article 8308-1.03(12) of the 1989 Act defines "course and scope of employment" as "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 isperformed by an employee while engaged in or about the furtherance of the affairs or business of the employer." Appellant cites several cases including Biggs v. United States Fire Insurance Co., 611 S.W.2d 624 (Tex. 1981), Texas General Indemnity Co. v. Bottom, 365 S.W.2d 350 (Tex.

1963), and Vernon v. City of Dallas, 638 S.W.2d 5 (Tex. App.-Dallas 1982, writ ref'd n.r.e.), which provide interesting reading as to the subject of deviation but do not control the circumstances herein. While Lesco Transportation Co., Inc. v. Campbell, 500 S.W.2d 238 (Tex. Civ. App.-Texarkana 1973, no writ) found that doing personal work was a deviation from course and scope, two other points were equally important in considering how it may affect the case before the appeals panel. This was a personal injury suit directly against an employer in which the worker presented evidence to show that he was not in the course and scope of employment. This employee was also a lessor of his truck to employer. While waiting in the area for a possible call to haul a load for employer, he changed the oil on his own truck and was injured. In affirming the determination that the accident was not within the course and scope of employment, this court said, citing many authorities, that deviation is ordinarily a fact issue to be decided by the trier of fact. Roberts v. TEIA, 461 S.W.2d 429 (Tex. Civ. App.-Waco 1970, no writ) and Ranger Ins. Co. v. Valerio, 553 S.W.2d 682 (Tex. Civ. App.-El Paso 1977, no writ) are more decisive in their rulings, but each is distinguishable and therefore does not control this case. Roberts involved a worker who had not begun the day's work when she took an empty box given to her by her employer to her car parked outside her work area. The court noted that her job was to fill mail order applications for sewing patterns and said, "[s]he was engaged in a purely personal mission, and the injury was not compensable." We note that she was not helping another employee in any endeavor that directly or indirectly benefited the employer; she was not returning her property, which she had used for the benefit of the employer, to her car; she was leaving her work area; and she had not started her work for the day so there was no question of acquiesence by those above her. In Valerio, the employer said that the employees "had never been permitted nor instructed to move any irrigation pipe . . . and it would not help the employer in any way for any employee to shake a rabbit out of an irrigation pipe." The court said, "[h]ere, the risk to which Valerio subjected himself when he raised the irrigation pipe to get the rabbit and touched the powerline was foreign to anything that had to do with his employment in picking up butane tanks." The differences between Valerio's facts and those in the case before us are fairly evident--moving tools had been permitted before at respondent's worksite and was characterized as "acceptable conduct" by the service manager. Also, as GD said, "it takes tools to make money." For a worker, making $15.50 an hour, to use his own extensive set of tools on the job is of benefit to the employer, who receives $40.00 an hour for such work. The loaded tool box in question, while never appraised for the record, contributed some value to the work done for the employer. For the employer to have his business furthered by a mechanic using his own tools on the job, for which no cash outlay was required of the employer, it is necessary first to get the tools in position on the job site. The basis of appellant's attack in this case suggests that it would be no different if the injury had happened as respondent and others unloaded a new employee's tools. While an injury incurred while unloading tools that will be used in the workplace may be easier to see as work related, a newly employed mechanic may not bring his tools to the job if removing them upon departure is known to be difficult or even prohibited. As a result, use of personal tools on the job cannot be viewed as a singular event in which those tools are considered only while used at the jobsite, but rather must be seen as a process that includes the positioning of the tools at the site, the use of the tools in the work, and the removal of the tools from the site. Unlike Valerio, no step of this

process was "foreign" to anything that had to do with the work; on the contrary even the last step in the process contributed to the furtherance of the business of the employer. As each worker described an ongoing process of helping each other do the job (which benefited the employer but only helped the assisting employee in the future when he was assisted in turn) so too must removal of tools not be considered in a vacuum but as a step in a continuous method of doing business. Valerio does not control this case.

As pointed out by respondent, Mapp v. Maryland Cas Co., 730 S.W.2d 658 (Tex. 1987), ruled that even when an employee left the job site to eat lunch and was injured, a question of fact was presented, and Dallas County v. Romans, 563 S.W.2d 827 (Tex. Civ. App.-Tyler 1978, no writ), found injury to be in the course and scope of employment when a worker relieved another before signing in. Two other cases should be considered in this issue of deviation. Texas General Indemnity Co. v. Luce, 491 S.W.2d 767 (Tex. Civ. App.-Beaumont 1973, writ ref'd n.r.e.) and Gulf Ins. Co. v. Johnson, 616 S.W.2d 320 (Tex. Civ. App.-Houston [1st Dist] 1981, writ dism'd by agr.) both found occasion to discuss deviation in terms of "reasonableness." In Luce, the reported facts described a vacationing employee returning to the site, as required, to receive accumulated pay. She was not required to greet fellow employees behind a serving line. When she did so, she was injured. The court did not find any benefit to, or any direction from, the employer in regard to her greeting others. Nevertheless, the court said that her act was not such a deviation as to remove her from coverage. "The law must be reasonable" and "[w]e are unable to apply the principle of deviation from employment so rigidly as to ignore the common habits of most people." In Johnson, a dishwasher at a recreational camp drowned in the river on the property of the camp. While the employer in that case said that deceased had been told the waterfront was restricted, it was not established as a matter of law that deceased violated any rule. Deceased was at the camp 24 hours a day, and the court said that the jury was entitled to conclude that deceased drowned while doing what might reasonably have been expected of him. "Also, it is not required that the injury should have occurred during the hours of actual service, nor that at the time of being injured the employee should have been engaged in the discharge of any specific duty incident to his employment." These cases not only affirm the principle that a question of deviation is usually for the fact finder to decide, but also look at "reasonableness" in applying legal standards to facts. One then speaks favorably to considering the "common habits" of people. While the evidence in the case under consideration sufficiently supports the determination that an injury occurred in the furtherance of the employer's business, we note that these two deviation cases do not hold that every deviation will take an injury out of the course and scope of employment. A different aspect of "deviation" was addressed by JC's testimony that employer had no rule against worker's helping each other move tool boxes. Although JC had told some workers to use a forklift in moving the big tool boxes, that instruction was not given to respondent and would only go to the manner or method of doing the job, not to the scope. A failure to do a job in the manner instructed, whether orally or written, does not place the resultant injury outside the course and scope of employment. Port Neches Ind Sch. Dist. v. Soignier, 702 S.W.2d 756 (Tex. App.-Beaumont 1986, writ ref'd n.r.e.)

Appellant's Point of Error Nos. 1 and 2 state there is either no or insufficient evidence

to support Conclusions of Law Nos. 3, 4, 5, and 6. Those conclusions are:

3.That the activity in which the Claimant was involved at the time of his injury originated within the work and is common to the profession of the employer.

4.That assisting an employee who was quitting, in lifting and loading personal tool box on employee's (sic) premises, was reasonable and foreseeable.

5.That claimant's providing of assistance to another individual, under the circumstances, was in the furtherance of the affairs of the employer.

6.That the claimant has proven by a preponderance of the evidence that his injury was sustained within the course and scope of his employment.

Points of Error No. 1 and 2 are rejected. As discussed previously, there is some evidence to support all four conclusions. In addition, the circumstances herein are consistent with case law that views deviation questions as ones for the trier of fact. It was for the hearing officer, as trier of fact, to make these decisions and his conclusions were based on sufficient evidence, not just from the testimony of the respondent, which alone may be sufficient, but also from witnesses called by appellant.

Point of Error No. 3 merely says that Conclusions of Law Nos. 3, 4, 5, and 6 are arbitrary and talks of substantial evidence as a standard for review. Point 3 is rejected. Texas Workers' Compensation Commission Appeal No 92148 (Docket No DA-91-150445-01-CC-DA41) decided May 29, 1992, points out that the 1989 Act does not apply the Administrative Procedures and Texas Register Act, TEX. REV. CIV. STAT. ANN. Art. 6252-13a for purposes of review. However, if we were to consider this case under a test of substantial evidence, we would not find the decision to be arbitrary.

Point of Error 4 states that there is no evidence to support the decision that respondent is entitled to benefits. Point 4 is rejected. There is sufficient evidence to show that respondent was injured in the course and scope of employment. Articles 8308-4.61 and 4.22 of the 1989 Act provide that medical benefits accrue when a compensable injury occurs. Temporary income benefits may be calculated from information in the case file, including the Benefit Review Conference Report admitted in evidence. There is some evidence to support entitlement to benefits. See also responses to Points of Error 2 and 5.

Point of Error No. 5 merely restates Point of Error No. 2 from the "against the great weight and preponderance of the evidence" perspective instead of from the "insufficient evidence" side of the coin in attacking both the conclusions of law specified previously and the Decision and Order. Point 5 is rejected. The decision states that respondent is entitled to "such benefits as may be due" based on his injury. Article 8308-4.21 does not

require specificity in the order once a compensable injury is found. In addition, Conclusions of Law Nos. 3, 4, 5, and 6 were not against the great weight of the evidence because of weight that could be assigned to respondent's testimony, that of GM as to the injury, and that of other witnesses for appellant as to work practices. The decision and order were sufficiently supported by conclusions of law and were not against the great weight of the evidence.

Point of Error No. 6 states that the findings do not support the conclusions. Articles 8308-6.32 and 6.34(g) of the 1989 Act, together with Tex W. C. Comm'n, 28 Tex Admin Code § 142.1 (rule 142.1), indicate that only section 14(n) of APTRA applies and that the 1989 Act does not impose stringent standards on findings in relation to conclusions. Decisions as to the sufficiency of findings and conclusions under APTRA criteria do not control. Conclusions of law made by the hearing officer are sufficiently supported by his findings, particularly findings 3, 4, 8, 9, 10, 12, 13, and 14.

Point of Error No. 7 repeats identically, word for word, Point of Error No. 3. Point of Error No. 7 is rejected for the same reasons as was Point of Error No. 3.

Point of Error No. 8 states that the hearing officer incorrectly recited as a stipulation that it is customary for one mechanic to help another move a tool box. Appellant's point is well taken. The record shows discussion on this stipulation but does not show that appellant agreed. The finding of fact that comes closest to reflecting use of the erroneous stipulation is number 12. It, however, does not address whether it is customary to assist in regard to tool boxes, but says it is "common" to assist one another. No reference to tool boxes is made, and apart from the erroneous stipulation, respondent and two of appellant's witnesses directly testified consistent with finding 12. Consequently, this was not reversible error. See Atlantic Mutual Ins. Co. v. Middleton, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

Point of Error No. 9 states that the Statement of Evidence is incorrect and does not accurately reflect the testimony. The only example cited in this point is the erroneous stipulation in Point of Error 8. Except for that point the Statement of Evidence is consistent with the evidence presented at hearing. As stated before, the erroneous reference to a stipulation was not reversible error in this case.

Point of Error No. 10 attacks the finding of an injury. Appellant says there was no issue as to injury. This point is also rejected. The record shows, however, that "injury" was included, as if it were not in dispute, within the issue of course and scope of employment that was before the hearing officer and to which there was no objection. Issue was taken with a possible stipulation as to injury, but the issue itself was never redefined. In the hearing, evidence as to injury was directly provided by respondent and could also be inferred from the testimony of GD. The hearing officer is directed by Article 8308-6.34(g) of the 1989 Act to make findings of fact, conclusions of law, and to determine whether benefits are due. The appeals panel has recognized this duty and has allowed a finding to stand when evidence of record will support it. The hearing officer cannot determine whether benefits

are due unless the question of injury is addressed through a finding, is not in dispute, or has been superceded by failure to comply with Articles 8308-5.01 through 5.23, as applicable. Notwithstanding the refusal to stipulate, appellant's statement to the hearing officer on page 28 of the transcript shows that the issue of injury had never been raised.

Hearing Officer:Do you see a need to have to litigate that there was an injury?

Appellant's counsel:At this time, no. The only issue is course and scope and there's no--there's never been an issue raised as to the existence of an injury.

While appellant appears to want the luxury of later disputing whether there is an injury should it lose the decision on course and scope of employment, it must overcome two provisions of the 1989 Act to do so. Article 8308-6.02(a) of the 1989 Act says, "[t]he division of hearings shall conduct benefit review conferences, contested case hearings, . . . and appeals within the agency related to workers'compensation claims." Contested case hearings address matters that are in the nature of a claim, and the basis for any claim within Articles 8308-6.01 through 6.45 of the 1989 Act is an injury, as defined in the Act. There are no provisions for advisory opinions within Articles 8308-6.01 through 6.63 of the 1989 Act. *Also see* Appeal No 92148, *supra*. As stated, Article 8308-6.34(g) of the 1989 Act provides that the decision will include a determination of whether benefits are due and benefits can only be addressed after the question of injury is resolved or is shown to be unnecessary to a decision because a relevant time limit has passed. In addition, Article 8308-5.21 of the 1989 Act and rules 124.1, 124.2, 124.4, and 124.6 require notice of the specific ground(s) for defending a compensability question within a specified time, usually 60 days after the carrier received notice of the injury. According to information in evidence, such notice occurred on August 29, 1991. That fact, coupled with counsel's statement above, show that at the time of the hearing there was no dispute as to injury. The time period to raise lack of an "injury" as a defense to compensability may have long since passed.

The finding of injury was supported by evidence of record and was not premature because of the way in which the issue included the word "injured" when recited. If the issue of injury had been raised at hearing, it would have been subject to the requirements of Article 8308-5.21(c). That article does allow an issue, such as injury, to be raised when based on newly discovered evidence that was not reasonably discoverable earlier, but this record discloses no indication of new evidence. Under Articles 8308-5.21, 6.02 and 6.34(g) of the 1989 Act, the issue of injury may not be "saved" when the time period applicable in Article 8308-5.21 has expired, absent "newly discovered evidence," because that article was not followed and because the hearing officer cannot provide a decision that meets the requirements of Article 8308-6.02 and 6.34(g) without considering "injury" as discussed above.

The decision of the hearing officer is supported by sufficient evidence of record and is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

_____
Sue M. Kelley
Appeals Judge