APPEAL NO. 93484

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq*. (Vernon Supp.) (1989 Act). A contested case hearing, was held in Corpus Christi, Texas, on May 20, 1993. The issues at the hearing were whether the appellant (claimant herein) was injured in the course and scope of his employment on _____, and whether the claimant has suffered any disability as a result of the injury on _____. The hearing officer found that the claimant was not injured in the course and scope of his employment when the claimant was injured during a scheduled break having fallen down while tossing a football with coworkers.

The claimant appeals arguing that an employee who is injured on an employer's premises while holding himself out in readiness to work is a covered employee under the 1989 Act. Claimant further argues that applying the personal health and comfort doctrine he was a covered employee at the time of the accident. Finally, the claimant contends that medical evidence showing his doctor has placed him off work and recommended surgery on his knee proves disability even though the claimant has returned to work because of economic necessity.

The respondent (carrier herein) replies that the claimant was not holding himself in readiness to work when he was injured, that the personal health and comfort doctrine does not apply to playing football during a break, and that the claimant did not have disability because there was not a compensable injury. The carrier also argues that the decision of the hearing officer is supported by sufficient evidence and should not be disturbed.

DECISION

After reviewing the evidence, we reverse the decision of the hearing officer that the claimant's injury was not compensable and render a new decision that the claimant was injured in the course and scope of employment. We reverse the decision of the hearing officer that the claimant did not have disability as a result of his injury and remand for further development of the evidence, if needed, and new findings on this issue consistent with this decision.

The facts of the case are essentially undisputed. The claimant was employed at the time of injury by an employer which manufactures offshore safety, environmental clean-up and helicopter rescue equipment. The claimant worked in the fiberglass shop grinding fiberglass, a job which required him to stand all day and to do occasional lifting. The employer requires that employees punch a time clock at the beginning and at the end of the day as well as punching in and out for lunch. During the course of the day, the employer provided a 10 minute break in the morning and in the afternoon. The employees were not required to punch out for these breaks and thus during break time are still being paid. A bell sounds at the beginning and the end of each break period, calling employees

to break and then back to work.

On _____, during the morning 10 minute break, the claimant was tossing a football in an unpaved field which is part of the employer's premises when he tripped in a hole and injured his left knee. The claimant testified that he was jogging toward the football when he fell, but that the fall was caused by the hole in the ground. The claimant further testified that at the time of his injury it was usual for employees to go outside and throw the football, that the employees do not actually play football in that there are no teams, contact, or scoring, and that supervisors were aware the employees tossed the football during breaks. The claimant also testified that he had to hold himself in readiness for work while on break.

Mr. L, a supervisor who appeared as the representative of the employer and who was called as a witness by the carrier, testified that the tossing of the football during breaks was done with the employer's implied consent and had been taking place for a few months prior to claimant's accident and that supervisors, including himself, sometimes participated. Mr. L testified that while the employer is not required by law to give employees breaks the employer has chosen to do so. Mr. L testified that the purpose of the breaks was for employee morale for the most part, but stated that another purpose of the breaks was to help employees function better in their jobs. Mr. L also testified that employees are free to leave the premises during the breaks and some do so, but typically employees in the fiberglass shop, where the claimant works, do not. Mr. L agreed under cross-examination that employees must hold themselves in readiness for work during the break, being ready to return to work when the bell rings. Mr. L also testified that if an employee left the premises during a break and was a few minutes late in getting back that the employer would "not have a particularly big problem with that."

The claimant testified that it would not be practical for an employee to leave the premises during a break because of the brevity of the break and the location of the employer's premises. His testimony agreed with Mr. L's that the employees were not required or expected to toss the football on the breaks. The claimant agreed under cross-examination that an employee was free to smoke or play cards during the breaks and that tossing the football had nothing to do with his work related duties.

The claimant stated that after his accident he reported his injury to a supervisor who told him that since nothing could be done he would have to "tough it out." The claimant stated that because of continuing problems with his knee he went to a doctor on his own about a week after the accident. While claimant's testimony as to the time he missed from work as a result of his injury is somewhat unclear, it is basically in accord with medical records showing that he was placed off work by his doctor from February 4 through February 8 and from February 15 to April 24, 1993. The claimant testified that he requested his doctor release him to return to work in April 1993 because he could no

longer financially afford to be off work. Both the claimant and Mr. L testified that since returning to work that the employer had accommodated the claimant by providing him mostly lighter duty work. The claimant testified that he was continuing to work at the time of the hearing at his preinjury wage (both parties stipulated that claimant's preinjury average weekly wage was $191.00), but even though his doctor has told him he needs surgery, without which he is irretrievably damaging his leg, he has no choice but to continue working because the carrier has denied all income and medical benefits.

The claimant testified that the condition of his leg is no better than it was before he returned to work. Mr. L testified that the employer had been willing at all times after the injury to make the accommodations for the claimant it has been making since the claimant returned to work.

Article 8308-1.03 (1989) states in relevant part:

> "Course and scope of employment" means 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. . . .

This definition is very similar to the definition developed under prior law.[1] Under prior law Texas courts recognized the personal comfort doctrine.[2] Succinctly, the doctrine is that when an employee engages in an act which ministers to the employees personal comfort he does not thereby leave the course and scope of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred.

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[1] The prior law's definition of course and scope of employment was apparently derived from an early statutory definition of injury and preserved in case law. One arguable difference between the prior law and the 1989 Act is that under the prior law regarding the definition of course and scope of employment is that under prior law the injury had to arise out of the employment; the 1989 Act requires that the activity (which results in injury) must arise out of the employment.

[2] Professor Larson in his treatise on workers' compensation law has described the personal comfort doctrine as follows:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

Larson, Workmen's Compensation Law, Vol. 1A § 21.00, p. 5-5 (Matthew Bender, 1992).

Traditionally, the personal comfort doctrine as kept an employee in the course and scope of employment while doing such things as using eating, getting a drink of water, smoking, and using toilet facilities.[3]

The Supreme Court of Texas in the case of Yeldell v. Holiday Retirement and Nursing Center, 701 S.W.2d 243 (Tex. 1985) (hereinafter Yeldell) held that an employee was in the course and scope of her employment, due to the personal comfort doctrine, when she was injured while making a personal telephone call at work. In Yeldell the Supreme Court makes a couple of statements that would indicate that the claimant in the present case might be considered in the course and scope of his employment under the personal comfort doctrine. First, the Supreme Court says in Yeldell at 245:

> By refusing the writ of error in Shook, *supra,* Southern Surety Co. v. Shook, 44 S.W.2d 425 (Tex. Civ. App.-Eastland 1931, writ ref'd)] we adopted the holding that Shook had not deviated from the course and scope of employment by going a half a mile from his employment to hunt wolves.

Later the Court states in Yeldell at 245-6:

> 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 a refreshment break. In particular, a parent's telephone call to a minor child at bedtime is as reasonably necessary to a workers' well-being as quenching one's thirst or relieving hunger. It is more common than exercise or recreation as was approved in Shook. The trial court did not err in holding that as a matter of law Yeldell was within the course and scope of her employment.

In the present case where the claimant was injured while taking a break on the employer's premises, we believe that the personal comfort doctrine would apply, under the clear language of Yeldell.

Under prior law, it was also held that an injury occurring while an employee is engaged in a recreational or social activity sponsored by his employer is in the course and scope of employment if: (1) participation in such activity is expressly or impliedly required by the employer; or (2) the employer derives some benefit from the activity, other than the health and morale of the employee; or (3) where the injury takes place at the place or immediate vicinity of employment while the employee is required to hold himself or herself

[3] For a detailed discussion of the personal comfort doctrine *see* Larson, Workmen's Compensation Law, Vol. 1A § 21.00, pp. 5-5-86 (Matthew Bender, 1992).

in readiness for work, and the activity takes place with the employer's express or implied permission. Mersch v. Zurich Insurance Company, 781 S.W.2d 447, 450 (Tex. App.-Fort Worth 1989, writ denied) (hereinafter Mersch).[4] We have implicitly held that this test applies to the 1989 Act by citing it in Texas Workers' Compensation Commission Appeal No. 92460, decided October 12, 1992.

The claimant argues that the third part of the disjunctive test of Mersch applies to the present case and under this test he argues that he was in the course and scope of his employment at the time of his injury. Meeting this test itself has three requirements: 1. that the injury take place at the place or in the immediate vicinity of employment; 2. that the injury take place while the employee is required to hold himself or herself in readiness for work; and 3. that the activity at the time of injury takes place with the employer's express or implied permission.

The uncontroverted evidence in this case clearly establishes the first and third of these requirements. The claimant testified that he was injured in a field next to the building in which he worked and which field he thought was part of his employer's premises; the employer's representative testified that the field in which the claimant was injured was part of the employer's premises. The testimony was also uncontroverted that the claimant met the third requirement. The claimant testified that supervisors were aware that employees tossed the football during break, and sometimes even participated. The employer's representative not only confirmed the knowledge and participation of the employer's

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[4] This test is similar to the following rule described by Professor Larson in his treatise on workers' compensation law as to when recreation and social activities are in the course an scope of employment:

> Recreational or social activities are within the course of employment when:
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> (1) They occur on the premises during a lunch or recreation period as a regular incident to the employment; or
>
> (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

Larson, Workmen's Compensation Law, Vol. 1A § 22.00, p. 5-87 (Matthew Bender, 1992).

supervisors to the football tossing, but testified that the employer had given its implied permission to employees to do so. Thus the only question which is contested is whether when the accident took place was the claimant required to hold himself in readiness for work.

There was evidence adduced at the hearing that the claimant was required to hold himself in readiness for work. The only two witnesses to testify at the contested case hearing--the claimant and the employers representative-- testified that this was the case. The fact that the employer had instructed the employees to return to work at the sound of a bell, presumably under the employer's control, is further evidence that the employees were held in readiness to return during breaks. Also the fact that the employees were on the clock, being paid, while on break was another indication that they were held in readiness.

The carrier argues that there is countervailing evidence that the claimant was not required to hold himself in readiness to return to work. Carrier argues that since the "law mandates that employees are provided with and actually take breaks, an employee is not waiting for work, and is not expected to hold himself in readiness for work." The carrier does not cite any statutory authority for its assertion that breaks are required. We note that the carrier's sole witness--the employer's representative--stated that the employer was not required to provide the breaks and did so voluntarily. Further, we are unable to locate any statutory authority requiring breaks, and while we certainly do not want to disparage the provision of paid breaks in any way, we must reject carrier's argument in lieu of supporting authority.

The carrier also argues that the fact that the claimant was on the premises at the time of the accident is not proof that he was required to hold himself in readiness for work. The carrier cites Texas Employer's Insurance Association v. Prasek, 569 S.W.2d 545 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.); Liberty Mutual Insurance Company v. Hopkins, 422 S.W.2d 203 (Tex. Civ. App.-Beaumont 1967, writ ref'd n.r.e); and American General Insurance Co. v. Williams, 227 S.W.2d 788 (Tex. 1950) for this proposition. We do not necessarily disagree with the proposition, but simply find the great weight evidence, cited *supra*, is that the claimant was in the present case required to hold himself in readiness to return to work.

Finally, the carrier argues that whether or not the claimant was required to hold himself in readiness for work is a question of fact and we should not disturb a finding of fact by the hearing officer unless it so against the great weight of the evidence as to be manifestly unjust. We agree with this standard of appellate review and have indeed cited it many times as dispositive. The reason it does not apply in the present case is that a careful review of the hearing officer's findings of fact reveal that he made no finding of fact that the claimant was not required to hold himself in readiness for work. This linked with the fact that we can find no evidence in the record which would support such a finding, had

the hearing officer made it, requires that we reject carrier's argument.

The finding of fact upon which the hearing officer's decision is based goes not as to whether the claimant met the requirements of the third prong of the recreational exception in Mersch, but whether the claimant was within the ambit of the exception at all. The hearing officer made the following finding of fact:

FINDING OF FACT

8. The tossing and catching of the football during a break period was not a social or recreational activity sponsored by Employer.

The rationale of the hearing officer appears to hinge on the language found in Mersch describing the situation to which its three prong test applies as one in which "an injury occurring while an employee is engaged in a recreational or social activity *sponsored* by his employer." (Emphasis added). The hearing officer in finding that the employer did not sponsor the tossing of the football, apparently relied upon testimony from the claimant and the employer representative that the employer neither required nor forbade the practice. It can be argued that there was evidence contrary in that supervisors also participated, and may have therefore by encouraging the tossing of the football, provided employer sponsorship. This determination would clearly be within the province of the fact finder.

While it has been argued that the requirement of employer sponsorship should not required to prove the recreational exception,[5] we do find this issue controlling in the present case. The evidence here is not that the injury was caused by the tossing, or even the catching, of the football, but by the claimant stepping into a hole and falling. This happened when the claimant was on break. The ultimate question then in the present case is whether the claimant was in the course and scope of his employment while he was on break. As both the claimant and the employer's representative testified, employees were free within limits of safety and time to do whatever they wanted when on break--toss the football, play cards, smoke. The break itself, not the tossing of the football, was the relevant social or recreational activity. It also was an activity clearly sponsored by the employer according to the testimony of the employer's representative, and there is no evidence to the contrary. During the break the claimant met the three requirements of the third prong of the test in Mersch to determine whether a recreational or social activity is in the course and scope of employment as discussed, *supra*. Based upon this evidence and applying Mersch we are compelled to reverse the hearing officer and render a decision that the claimant was in the course and scope of his employment at the time of his injury.

[5] *See* Larson, Workmen's Compensation Law, Vol. 1A § 22.11, pp. 5-91-2 (Matthew Bender, 1992).

Finding compensability under these facts is in line with the law of the majority of other jurisdictions.[6] It is also supported by the rationale of prior decisions of Texas courts. *See* Yeldell v. Holiday Hills Retirement and Nursing Center, 701 S.W.2d 243, 245 (Tex. 1985); Fidelity & Guaranty Insurance Underwriters, Inc. v. Rochelle, 587 S.W.2d 493, 495 (Tex. Civ. App.-Dallas 1979, writ dism'd); Texas Employers' Insurance Association v. Prasek, 569 S.W.2d 545, 548 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.); Southern Surety Co. v. Shook, 44 S.W.2d 425 (Tex. Civ. App.-Eastland 1931, writ ref'd).

As to the issue of disability, the hearing officer found no disability since he found that the claim was non-compensable. This was apparently based upon the statutory definition of disability under the 1989 Act which provides that disability means the inability to obtain or retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). Now that we have found that the claimant's injury is compensable, the issue of disability needs to be addressed. We reverse the decision of the hearing officer and remand the case to allow him to make new findings on this issue in light of our decision and to further develop the evidence on this issue, if needed.

The decision and order of the hearing officer are reversed and rendered in part and reversed and remanded in part. A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings,

[6] *See* Larson, Workmen's Compensation Law Vol. 1A § 22.11, pp. 5-91-99 (Matthew Bender, 1992) *and cases cited therein.*

pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge