APPEAL NO. 94079

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. LAB. CODE ANN. § 401.001 *et seq*. On December 10, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) was injured in the course and scope of employment when she fell during a break from work. Appellant (city) asserts that claimant was not in the course and scope of employment at the time because she did not hold herself in readiness for work while on break; city also states the hearing officer's opinion was filed late. Claimant replies that the decision should be affirmed.

DECISION

We affirm.

Claimant had worked as an accountant for the city for 12 years. The office building in which she worked was across the street from another office building owned by the city, in which other city employees worked. Her place of work had a break room but the city building across the street had a restaurant and an automated teller machine. The evidence indicated that city employees in the Finance Department in which claimant worked were given two 15 minute breaks each day. They could not be taken in conjunction with lunch or departure at the end of the day. (No question was raised about the time of the break.) The policy applicable to breaks by claimant is contained in a city directive, with pertinent parts reading as follows:

> Employees are provided two paid 15 minute breaks each day to give them a period of rest away from the job. Because a break is intended to refresh the employee and make him or her more productive, breaks will be taken mid-morning or . . . .

On (date of injury), while taking a break from work claimant was across the street in the city building when she slipped on stairs, fell, and injured her knees; no medical records are in the record, but there is no dispute that the accident happened. Claimant's supervisor was told and took her to the emergency room at Hospital.

Claimant testified that she took breaks at the city building across the street often. Her supervisor, (Mr. C), said other employees took their breaks there, and he had too. He testified that there are no restrictions on where employees go on their break so long as they return timely. (Mr. P), the city controller (Mr. C's superior) also testified that the policy quoted above as to breaks is correct; he added that he did not require employees to state when or where they take the break and no distance limit is placed on a break.

City argued that the hearing officer erred in applying the personal comfort doctrine rather than the criteria from Mersch v. Zurich Ins. Co., 781 S.W.2d 447 (Tex. App.-Fort Worth 1989, writ denied), which it says the Appeals Panel adopted in Texas Workers' Compensation Commission Appeal No. 92460, decided October 12, 1992. It said that because claimant did not hold herself "in readiness for work," she does not meet the test set

forth by Mersch. The city raised no issue on appeal as to the fact that claimant left the premises in which she worked and was then injured; no attempt was made to compare claimant's conduct to that of the worker in Turner v. Texas Employer's Ins. Association, 715 S.W.2d 52 (Tex. App.-Dallas 1986, writ ref'd n.r.e.), who was injured while driving through a parking lot of her employer, but not at the site of the employer where she worked.

The Mersch case involved a softball game in which Mersch was hurt; the event took place on a non-work day, Sunday, at a site that was not close to the workplace. In that context the court observed that Mersch was not required to hold herself in readiness for work. The court observed, "[a]ttendance was not compulsory and employees were not paid for attending." Appeal No. 92460 considered a case with one issue, whether a heart attack was compensable under the specific criteria for heart attacks found in the 1989 Act. It decided that the injury was not compensable and then observed, in dicta, that although "moot" the claimant's off-duty racquetball game was not directed or controlled by the employer, was away from the premises, and was voluntary. The opinion then restated that this question was not necessary to the decision.

The reference to Mersch in Appeal No. 92460 indicates that the Appeals Panel would probably consider its criteria in an applicable situation but does not indicate that it was "adopted." In addition, even if it were conceded that such criteria had been accepted as the standard by the Appeals Panel, both Appeal No. 92460 and Mersch are distinguishable in that they dealt with off-duty conduct. In contrast, city policy indicates that claimant's break was paid; in addition while she may not have been in a position to return to work at any point within the 15 minute break, there is no evidence that she was not holding herself in position to return to work at the end of the 15 minutes. We do not read in Mersch that the holding of oneself ready to return to work requires the ability to immediately perform one's duty; employees would have to stay at their work stations during a break if that were the standard.

The application of the personal comfort doctrine was not error. *See* T.E.I.A. v. Villasana, 558 S.W.2d 917 (Tex. Civ. App.-Amarillo 1977, no writ), in which a worker, who fell from a chair while on break, was awarded benefits based on the personal comfort doctrine. *Also see* Mapp v. Maryland Casualty Company, 730 S.W.2d 658 (Tex. 1987) which reversed and remanded Mapp v. Maryland Casualty Company, 725 S.W.2d 516 (Tex. App.-Beaumont 1987). The court of civil appeals had upheld summary judgment that a worker, injured after going less than one block away to a cafeteria for lunch, was not in the course of employment; Mapp was working for her employer that day in an office in which she worked once or twice a week but which was not her "regular" work site. The office in question was in a town approximately 20 miles from her home and there was no eating facility at her place of work. The Supreme Court, in reversing the appeals court's decision against Mapp, stated that a fact question had been raised.

We similarly believe that a fact question had been raised in the case on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92009, decided January 21, 1992. With the limited time away from her work, the fact that she was being paid and was not

violating any restriction on her break, the proximity of her fall to her work, the fact that the fall occurred in a building owned by the same employer (which may indicate that maintenance practices were comparable), and with appellant raising no question that the claimant was not at her work site or immediately adjacent to it, we must judge the determination of the hearing officer on the basis of whether it was against the great weight and preponderance of the evidence. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Having reviewed the record, the decision and order of the hearing officer are not against the great weight and preponderance of the evidence.

City also asserts error in the time taken after hearing to distribute a copy of the decision to it. Texas Workers' Compensation Commission Appeal No. 92456, decided October 8, 1992, considered time periods for providing a hearing officer's decision and concluded that the time specified is not mandatory. The decision in the case on appeal was not rendered void when not issued within the time period set forth by Section 410.168 and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.16.

The decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge