APPEAL NO. 94089

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 7, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The sole issue submitted for resolution was: Was Mr. R in the course and scope of his employment when he injured his ankle on or about (date of injury)? The hearing officer determined that the appellant, claimant herein, did not injure his ankle in the course and scope of his employment on (date of injury).

Claimant contends that the hearing officer erred in determining he had not been injured in the course and scope of his employment and requests that we reverse the hearing officer's decision and render a decision awarding him medical benefits. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The facts are relatively undisputed. Claimant testified telephonically through an interpreter that he was employed by (employer), employer herein, on (date of injury). Claimant testified that between 1:30 or 2:00 p.m. (some other testimony indicates the event took place during the lunch period of 12:00 to 1:00 p.m.) on (date of injury) he was removing plywood crating from some metal forms on the employer's premises. The testimony of claimant and others was that once the plywood crating was removed, the plywood was discarded. It is undisputed that employees, and others, could take the plywood for the asking. (There was some testimony that the employer was sometimes told when one of the employees had taken some of the plywood.) Claimant asked one of the crew leaders, (MM) if he could have a sheet of the plywood crating and that MM told him he could have the plywood. (Claimant's crew leader was (JG) but claimant asked MM because MM spoke Spanish). Claimant stated he wanted the plywood to place in the bed of his pickup truck to protect the bed. Claimant then carried the plywood to his pickup truck, which was parked nearby, and put the wood in the truck bed. Claimant stated that he then climbed into the truck bed to position the plywood. After positioning the plywood claimant jumped to the ground from the tailgate, landed in a hole (or depression in the ground), twisted his ankle and chipped a bone in his ankle. MM testified he saw claimant jump out of the truck and turn his ankle. It is undisputed that neither the employer nor either of the crew chiefs directed claimant to put the plywood in his truck. Nor is it disputed that claimant's truck was not being used for the employer's business at that time. (The testimony was that on occasion the employees might use their personal vehicles on employer's business). Claimant contends he was furthering the employer's business by disposing of the plywood (by placing it in his truck instead of the nearby dumpster).

The hearing officer determined that claimant's act of placing the plywood in the bed of his pickup truck was not an act which furthered the affairs or business of the employer but rather was in furtherance of claimant's personal affairs and was a deviation from his

normal employment duties. Claimant contends he "did get permission to take the piece of plywood . . . to protect the bed of my truck . . . ." (This fact was not disputed and was found to be fact by the hearing officer). Claimant contends he suffered his injury while he was walking "back to the pile of panels . . . on [employer's] property, while I was working." Claimant contends the employer "should be held liable because it happened on their property."

As indicated previously, the basic facts, as found by the hearing officer, are not in dispute. The key is whether the claimant's act of putting the plywood in his truck for purposes of protecting his personal vehicle, positioning the plywood and jumping from the tailgate to return to work, took claimant out of the course and scope of his employment. Section 401.011(12) of the 1989 Act defines course and scope of employment to mean:

> . . . an activity of any kind or character that has to do with and originated 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. The term includes an activity conducted on the premises of the employer or at other locations.

In Texas Workers' Compensation Commission Appeal No. 93484, decided July 30, 1993, the Appeals Panel held that an employee who was injured tossing a football while on break was compensable under the "recreational or social activity" rules. In the instant case it is not clear whether the claimant was on his lunch break or had deviated from his normal employment as the hearing officer seems to indicate. Texas Workers' Compensation Commission Appeal No. 91015, decided September 18, 1991, was an early Appeals Panel decision which involved a cafeteria employee, whose duty was to clean and sell seafood, and who inexplicably fell through the ceiling at the cafeteria. The injury was held not compensable as the employee was found to have deviated from his normal duties. The Appeals Panel in that case cited Ranger Ins. Co. v. Valerio, 553 S.W.2d 682 (Tex. App.-El Paso 1977, no writ), a case where a crew was at a site to pick up butane tanks. The crew could take coffee breaks. A crew member's chase of a rabbit from a pipe caused injury that was not in the course and scope of his employment - even though he could have been taking a break at the time. Appeal No. 91015 also cited Lesco Transportation Co. V. Campbell, 500 S.W.2d 238 (Tex. Civ. App.-Texarkana 1973, no writ) and United General Ins. Exchange v. Brown, 628 S.W.2d 505 (Tex. Civ. App.-Amarillo 1982, no writ) two cases which both stated that unless the proof is such that only one conclusion can be reasonably drawn from it by reasonable minds, deviation from the course and scope of employment is a question of fact to be determined by the trier of fact. In the instant case, the hearing officer, as the trier of fact, found that the claimant had deviated from his normal employment duties.

The case we believe to be most analogous to the instant situation is Roberts v. Texas Employers' Insurance Ass'n, 461 S.W.2d 429 (Tex. Civ. App.-Waco 1971, writ ref'd n.r.e.). Although distinguishable on some factual details, in Roberts, an employee was injured on the employer's premises during working hours. The employee's job was to fill mail orders

by selecting sewing patterns from bins. The employee, after finishing drinking coffee, asked her superintendent if she could have one of her employer's pasteboard boxes "in which to mail some cookies and cakes to her son." The superintendent told her she could have the box and the employee told the superintendent she was "going to take the box out to my car." The employee "was injured when she started to her car to put the carton in her car, parked on the employer's parking lot . . . ." The court held:

> The accident and appellant's injuries did not arise out of her employment; they did not have to do with or originate in her employer's business; and she was not engaged in the furtherance of her employer's affairs or business. There is no suggestion in the record that appellant was temporarily directed or instructed by the employer to perform any 'service' for or incidental to the work of the employer or that appellant was employed in the usual course of the employer's business when any purported direction was given or when the injury occurred. She was engaged on a purely personal mission, and the injury was not compensable. [Citations omitted.]

Under the rationale of the Roberts case, and finding that deviation from the course and scope of employment being a question of fact to be determined by the trier of fact, we find no error in the hearing officer's determination that claimant was in furtherance of his personal affairs and was not injured in the course and scope of his employment.

Having reviewed the record, we find no reversible error and sufficient evidence to support the hearing officer's factual determinations. In considering all the evidence in the record, we find that the decision of the hearing officer was not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer are affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge