APPEAL NO. 941693
FILED JANUARY 27, 1995

Following a contested case hearing held in _____, Texas, on November 18, 1994, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), the hearing officer determined that the respondent (claimant) was injured in the course and scope of employment when he fractured his ankle while playing basketball at his work place during a rest break on [Date of Injury], and that he had disability from that date through May 2, 1993. The appellant (carrier) asserts on appeal that the hearing officer erred as a matter of law in reaching this conclusion. The carrier has not appealed the disability determination. Claimant's response urges the correctness of the decision and seeks our affirmance.

DECISION

Affirmed.

On [Date of Injury], at about 3:00 p.m., while on his 15 minute afternoon break, claimant broke his ankle playing basketball at work. He testified that as of his injury date he had worked as a mechanic for (employer) for three years, received a guaranteed base salary in addition to commissions apparently related to each job performed, and was not required to use a time clock. He said the employer had set up the basketball hoop on its premises before he began employment and provided the ball so that the employees could play basketball on breaks; that the playing of basketball was voluntary and not expected by the employer; that the employer had advised the employees that if they got hurt, "you're on your own;" that some supervisors also played; that at the time, he was playing with the approval of his supervisor; and that after his accident the court was dismantled. He further testified that when on such breaks, he remained in readiness to resume work and that on an approximate monthly basis he would be called off break to perform some job. He said other employees, too, were sometimes called back to work in the midst of their breaks. In evidence was a statement from his supervisor, Mr. J, stating that claimant was injured playing basketball "during a company endorsed break" and that he had called claimant "away from this activity on previous occasions to attend to company work as necessary."

Mr. D, a supervisor, testified that employees on break could do whatever they pleased; that employer provided the basketball court and ball for purposes of employee morale but that employees were neither required nor expected to play basketball; that employees who were required to use the time clock did not clock out for the 15 minute breaks; and that the employer considered playing basketball an "off-duty" activity but "anticipated" that employees would play during their breaks. He agreed that claimant

and other employees were sometimes called off their breaks to resume work and that claimant was "in readiness" for work while on his break. He also testified that the employees were told they played at their own risk and would not be covered by workers' compensation if injured.

Claimant contended that his injury was sustained while he was in the course and scope of his employment and relied on our decision in Texas Workers' Compensation Commission Appeal No. 93484, decided July 30, 1993. The carrier urged that claimant's injury was not in the course and scope of his employment because it did not come within the ambit of the "personal comfort" doctrine and because it fell within the exception to carrier liability in Section 406.032(1)(D) which provides that a carrier is not liable if the injury "arose out of voluntary participation in an off-duty recreational, social, or athletic activity that did not constitute part of the employee's work-related duties, unless the activity is a reasonable expectancy of or is expressly or impliedly required by the employment."

In concluding that the claimant's injury was in the course and scope of his employment, the hearing officer reached the following factual findings which are not appealed from on a sufficiency of the evidence basis:

FINDINGS OF FACT

1. The Employer erected a basketball goal and established a location for its employees to play basketball on the Employer's premises during their breaks or lunch hours

2. .Many employees, whether paid hourly, on salary, or on commission, availed themselves of the opportunity to play basketball during afternoon breaks or during lunch breaks.

3. On [Date of Injury], the Claimant, an employee who was paid a base salary or draw, plus commission when it exceeded his base salary, broke his ankle while playing basketball during his afternoon break.

4. The Claimant did not clock out on any time clock to take an afternoon break.

5. Although expressly or impliedly permitted by the Employer, the Claimant's participation in the basketball game was not expressly or impliedly required by the Employer.

6. The Employer derived no benefit from the Claimant's participation of the basketball game other than the promotion of the Claimant's health and morale.

7. All employees, including the Claimant, where [sic] required to hold themselves in readiness for work and abandoned the game of basketball and returned to work at the Employer's request, even if such request occurred during the course of the employee's break from his or her duties.

The carrier complains of the hearing officer's failure to discuss her theory of the compensability of the injury and asserts that the hearing officer erred as a matter of law in applying the "personal comfort" doctrine (if she did) and in not applying the exception to liability found in Section 406.032(1)(D) (if she did not). We agree the hearing officer's decision fails to enlighten the reader as to the legal rationale she employed. However, the Appeals Panel has held that the decision of the fact finder should be affirmed if it can be sustained on any reasonable theory supported by the evidence. Texas Workers' Compensation Commission Appeal No. 93502, decided August 4, 1993.

We regard our decision in Appeal No. 93484, *supra*, as remarkably similar on the facts and dispositive of this case. As in the case we consider, the facts in that case were essentially undisputed. The employee, while on a 10 minute morning work break, for which he was being paid, was tossing a football in a lot on the employer's premises with coworkers when he stepped into a hole and sustained an injury. A supervisor testified that the employer provided the breaks for employee morale, that while the employees were free to leave the premises during the breaks they typically did not do so, that during the breaks the employees were required to hold themselves in readiness for work, that the employees were not required or expected to toss the football during breaks, that tossing the football during breaks was done with the employer's implied consent, and that supervisors sometimes joined such activities. The Appeals Panel reversed the hearing officer's decision against the employee, rendered a new decision that the employee had been injured in the course and scope of his employment, and remanded the case for further development of the evidence on the disability issue.

The decision in Appeal No. 93484 found the "personal comfort" doctrine to be applicable to the employee's taking the break on the employer's premises. (In Texas Workers' Compensation Commission Appeal No. 94559, decided June 10, 1994, the Appeals Panel affirmed the hearing officer's decision which applied the "personal comfort" doctrine to a bus driver injured when stepping off a bus to take a smoke break.) Applying the "personal comfort" doctrine removed the injury from the exception in Section 406.032(1)(D). We find this case to come within the "personal comfort" doctrine and not within the exclusion in Section 406.032(1)(D). The decision Appeal No. 93484, *supra*, also found the employee's injury to be in the course and scope of employment under the "old law" test stated in Mersch v. Zurich Insurance Company, 781 S.W.2d

447, 450 (Tex. App.-Fort Worth 1989, writ denied) which, the opinion noted, was implicitly held applicable under the 1989 Act in Texas Workers' Compensation Commission Appeal No. 92460, decided October 12, 1992. The decision stated the Mersch test as providing that an injury occurring while an employee is engaged in a recreational or social activity sponsored by the 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 him or herself in readiness for work and the activity takes place with the employer's express or implied permission. As in Appeal No. 93484, *supra*, it is obviously the third part of the disjunctive three-part Mersch test that could be applicable and we are similarly satisfied here that the evidence establishes the three elements within that third prong or test. However, typically, injuries sustained during short work breaks during working hours on the employers' premises will involve the application of the "personal comfort" doctrine. The Mersch test (and the Section 406.032(1)(D) exception) will typically involve social or recreational activities outside regular work hours. Accordingly, for the above reasons we cannot agree with the carrier that the hearing officer's conclusion is erroneous as a matter of law.

The decision and order of the hearing officer are affirmed.

Philip F O'Neill
Appeals Judge

CONCUR:

Lynda H Nesenholtz
Appeals Judge

Gary L Kilgore
Appeals Judge