APPEAL NO. 950057
FILED FEBRUARY 24, 1995

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held on December 5, 1994. The hearing officer determined that the respondent (claimant) sustained a compensable injury in the course and scope of his employment when involved in a motor vehicle accident on _____, and had disability from July 28, 1994, through August 11, 1994. The appellant (carrier) appeals urging that the hearing officer's finding and conclusion on a compensable injury in the course and scope are "supported by no evidence or are against the great weight and preponderance of evidence as to be manifestly unjust and/or because the hearing officer incorrectly interpreted and applied the burden of proof, law and definition of course and scope of employment." No response has been filed.

DECISION

We reverse and render.

The claimant had worked for the employer, an automobile dealership, for a month and a half to two months when he was involved in an automobile accident on _____. His job was to wash automobiles and to perform other duties such as driving customer's vehicles to be serviced. On _____, he was instructed to drive a customer to his home in the customer's vehicle and return the vehicle to the dealership to be serviced. On the way back from the customer's home he was traveling west on a highway that would take him directly to the dealership. It was about 9:45 a.m. and according to the claimant he decided to stop at a "(name)" convenience store for "lunch" and coffee and this required a left turn on to another highway. He got into the left lane, which was a "left turn only" lane, and proceeded to the intersection to turn left. At this time he hit a vehicle in front of him. Although not entirely clear, he claims he sustained some injury to his back (no medical reports were introduced into evidence). According to his supervisor, who first learned of the accident when the vehicle was towed into the dealership, he had to search for the claimant who apparently left after the accident and went home. In any event, the claimant was subsequently taken to a hospital by his supervisor and apparently was given some restrictions on work: according to the claimant, the doctor gave him "some disabilities and told him not to drive." However, the claimant has never gone back to work since _____. Although the claimant denied in prehearing interrogatories that he had previously received workers' compensation benefits, also in evidence was a settlement from a 1990 workers' compensation claim and a doctor's note dated July 22, 1991, that indicated the claimant had been admitted to a medical center for a laminectomy and discectomy for a herniated disc. The claimant testified that he was never given any instruction that he couldn't stop at a particular place and that "we had done it many times before" although he acknowledged that the employer did not tell him to go to any store.

The claimant's immediate supervisor, (Mr. D), testified that the claimant had never been give permission to stop at a convenience store, that he was not told to go anywhere but to the customer's house and return. Mr. D stated that it is not normal to specifically tell a driver they can't stop at a store; he is aware that it has happened, and the driver got into trouble and was reprimanded when reported. The second level supervisor, (Mr. C) testified that everyone is instructed that there is no personal use of a customer's vehicle and no eating or smoking in it. He stated that the claimant was not furthering the interests of the employer when the accident occurred and it was not a part of his job to go to the convenience store. Although they do not have a training program for "porters", Mr. C testified that new employee's are advised of the policies of the employer and that it's common knowledge that employees are not to use customer's vehicles for personal matters.

The hearing officer, in his statement of the evidence, stated that "[b]ecause Claimant was still traveling West on (the highway) at the time of the collision, I have determined he had not sufficiently altered his travel to return to the dealership to constitute a deviation from the course and scope of his employment" and "[f]urther, the deviation would have been so insubstantial due to the close proximity of the (name) convenience store to the location of the accident, that it falls within the comfort and convenience doctrine." We do not believe the hearing officer has correctly applied the law and accordingly reverse and render a new decision.

To be a compensable injury, a claimant must prove that he was injured while in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 401.011(12) defines course and scope of employment as follows:

> "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. The term includes an activity conducted on the premises of the employer or at other locations.

The hearing officer found that "[t]he evidence did not establish that Claimant was told by Employer that he could not make any stops while driving the van he was operating at the time or any other customer owned vehicle." In so far as this finding could be seen as bearing on the burden of proof, we are unaware of any legal concept that indicates an employer must instruct an employee not to deviate from the course and scope of his employment or not to stop, even temporarily, from furthering the affairs or business of the employer at the risk of having the activity found to be in the course and scope. Rather, as a general rule a compensable injury arises if an injury occurs in the course of activity that is

required or authorized by the contract of employment. Lesco Transportation Company, Inc. v. Campbell, 500 S.W.2d 238 (Tex. Civ. App.-Texarkana 1973, no writ). There is no question that the claimant was in the course and scope of his employment when he took the customer in the customer's vehicle to the customer's home and when he was on his direct return route to the dealership. Indeed, this was the job task given him by his employer. However, a different situation arises when, for his own personal desires and convenience, he appropriates for his own use the privately owned customer's vehicle and deviates from the direct route back to his employer's business. When an employee abandons and turns aside from the course and scope of his employment, such deviation defeats a claim for compensation. Lasco, *supra*; Texas Workers' Compensation Commission Appeal No. 92250, decided July 29, 1992.

Our review of the record convinces us that the hearing officer's focus was misdirected and resulted in a misapplication of the law. While the hearing officer may have chosen not to believe the testimony of the two supervisors that all employees including the claimant were advised of the employer's policies, that personal use of customer's vehicles was not allowed and that disciplinary action was taken anytime there was a report of a deviation such as occurred here, there was no evidence that such personal use of a customer' private property was in any way required or authorized by the contract of employment. Further, the evidence is absolutely compelling that the claimant deviated from the course and scope of his employment at the time of the accident. The evidence in this case does not support the hearing officer's determination that the claimant "had not sufficiently altered his travel" to constitute a deviation. Clearly, at the time of the accident, the claimant was not proceeding to the dealership; indeed, his own testimony was that he was on his way to a convenience store for personal reasons, that he was in a left turn only lane preparing to turn when the accident occurred and that he was going to proceed on to another highway. That the accident occurred before the turn was completed does not alter the undisputed fact that he had left the direct route back to the dealership at the time of the accident.

Although not a part of the findings of fact portion of his Decision and Order, the hearing officer stated in his Statement of the Evidence that if there was any deviation, it would have been so insubstantial that the comfort and convenience doctrine would apply. While his decision appears to be based upon a finding of no deviation, we feel it appropriate to comment on the personal comfort and convenience doctrine and express our disagreement with its application under the facts of this case. The personal comfort doctrine is a narrowly drawn exception to the general rule that the accomplishment of personal work or objectives is not within course and scope. *See* Texas Workers' Compensation Commission Appeal No. 941362, decided November 28, 1994. In that case the Appeals Panel upheld the decision denying benefits where a claimant was injured in a vehicle accident returning to a job site after driving to lunch at a restaurant some 10 minutes away. That decision cited a number of personal comfort and convenience cases,

pointed out several Texas cases where injuries during lunch periods, particularly on premises, had been held compensable under the personal comfort doctrine, and cited 1A Larson Workmen's Compensation Law § 21 and 21.23 (Matthew Bender 1993) for the general limitations on the doctrine. Larson discusses the lunch time on the premises exception and notes that generally special or exceptional circumstances are needed to bring an off premises lunch period injury within course and scope. The personal comfort doctrine would not normally apply if the claimant was injured during a normal lunch break where he chose to leave the premises and have lunch where he pleased. There are no special or exceptional circumstances present here which would cause the personal comfort doctrine to apply. In Texas Workers' Compensation Commission Appeal No. 94079, decided February 28, 1994, the Appeals Panel affirmed an award of benefits where a claimant was injured during a break in an employee owned building across the street from the building in which she worked. In affirming, we noted the fact the claimant was on an authorized break, was on premises owned by the employer, the close proximity of the fall to the work place, that the claimant was not violating any employer restrictions and that no question was raised that the claimant was not at her work site or immediately adjacent to it. The Appeals Panel also affirmed benefits under the personal comfort and convenience doctrine in Texas Workers' Compensation Commission Appeal No. 94559, decided June 10, 1994, where a bus driver, while on a break that was not in violation of any company rule or policy, slipped on the steps of his bus. The Appeals Panel cited Texas Workers' Compensation Commission Appeal No. 91019, decided October 3, 1991, a case applying the doctrine from an approved jury instruction as follows: ". . . an act at the place or area of employment necessary to the health, comfort, and convenience of an employee while within working hours, during a lunch period, or while preparing to begin work or leave the premises, is not a departure from the course of employment." In the case before us, the necessity of the intended stop under the circumstance was not apparent, the claimant was not at or adjacent to the dealership premises, he was in a customer's privately owned vehicle with no evidence that he was in any way authorized to use for personal matters, he was in violation of the employers policies on use of a customer's vehicle, and his employment did not at the time and place require or otherwise authorize him to use a privately owned vehicle to stop for personal reasons or to go to lunch. *See also* Texas Workers' Compensation Commission Appeal No. 94961, decided September 1, 1994, for a review of cases on the personal comfort doctrine. We conclude that under the facts and circumstances as developed in this case the personal comfort doctrine would not apply, and its application would be an unwarranted extension of the doctrine.

The decision and order of the hearing officer are hereby reversed. A new decision rendered that the claimant was not in the course and scope of his employment at the time of the accident on _____, and that benefits are not due under the 1989 Act.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge