APPEAL NO. 951583
FILED NOVEMBER 9, 1995

On July 28, 1995, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were: (1) whether the deceased suffered a compensable injury on _____, which resulted in his death, and (2) who are the legal beneficiaries of the deceased for workers' compensation purposes. The parties stipulated that, if it is determined that the deceased died of a compensable injury, then (claimant), who is the deceased's surviving spouse, is the only legal beneficiary of the deceased. With respect to the compensability issue, the hearing officer decided that the deceased's fatal injury on _____, did not arise out of his employment, and, accordingly, no benefits are due under the 1989 Act. The claimant appeals the hearing officer's decision and requests that we reverse the decision and render a decision in her favor. The respondent (carrier) requests affirmance.

DECISION

Reversed and rendered.

The style of the hearing officer's decision states that the deceased's name was (Name 3); however, it was pointed out at the CCH that the deceased's middle name was (Name 2) thus making his middle initial (Letter 1) and not (Letter 2). The claimant's appeal and the carrier's response also identify the deceased as (Name 1). Consequently, we have identified the deceased as (Name 1) in our decision on appeal.

The employer does hydrostatic testing on oil well tubing and casing. Crews go out to the oil field to do the testing. The employer's vehicles are repaired and maintained at the employer's shop. The deceased began working for the employer in 1986 and on the date of his death, _____, the deceased was the general manager of the employer's shop in (city), Texas. The parties stipulated that the deceased "was injured by a bee sting and died as a result on _____."

GG testified that he is the shop foreman. He was working with the deceased in the employer's shop on _____. He said that that morning, he and the deceased serviced one vehicle and then worked on a truck of the employer's that had a broken air compressor. He said that the claimant was drinking a Coke while working. He said that at about noon he left the shop and that at that time the deceased was still working on the truck and that the deceased had not been stung by a bee or other insect. He said that there is a trash can in the shop area and that he believed that the trash can in the shop was pretty full on that Saturday morning, because he had just returned from a four-day job and trash from that job, including food and soda cans, had been put in that trash can. He said that the trash can is emptied into a dumpster every morning. He also said that most of the big bay doors in the shop were open on that Saturday morning. He further testified that sometimes there are bees on the employer's premises and sometimes not. He is not

aware of anyone other than the deceased being stung on the employer's premises. He said that the employer allows employees to drink soda on the job and that there is a refrigerator in the shop. In a transcribed recorded statement, GG stated that he and the deceased were working on the truck on the concrete outside of the shop; that they were going back and forth into the shop while working; that at times he has seen four or five bees fly around the trash can and sometimes he didn't see any; that he did not recall if there were any bees or wasps on the employer's premises on the Saturday morning in question; that the truck that they were working on was fifty to seventy-five feet from the trash can inside the shop; and that there was no Coke machine in the shop. GG testified that at about 5:00 p.m. on the Saturday in question, the claimant called him and told him that the deceased had been stung by a bee at work and that he had died.

The deceased's son, WS, testified that he has been a sales representative for the employer since 1989. He said that on the Saturday morning in question, he went to the shop at about 10:30 a.m. and visited with his father for about 15 minutes and then he left and his father went back to working on the truck outside. He said that about an hour later his father called him to come to the shop office and when he got there his father told him that he was in the shop area drinking a Coke, and when he took a drink of the Coke, a bee stung him on the bottom of the tongue. He said his father had swelling and that he called an ambulance. The ambulance report indicates that emergency personnel received a call at 1:05 p.m. and arrived at the employer's shop four minutes later. The report also indicates that the deceased was having an allergic reaction and that he was taken to a hospital emergency room. WS said that the crews throw food and soda cans into the trash can in the shop area because they don't want to litter the customers' locations. He said he has seen bees around the shop area. He testified that he did not think that his father was exposed to any greater risk of a bee sting than the general public. However, he also testified that, because of the trash at work, it was more likely that his father would be stung at work than at home. He said that the employees keep snacks and refreshments in the refrigerator in the shop.

GS, who is the employer's human resources and safety coordinator, testified that repair and maintenance were part of the deceased's duties; that he had visited the shop where the deceased worked once or twice a year; that he was not aware of any problem with bees at the shop; that he was not aware of any injury reports from the shop from bee stings; that he didn't notice any trash problem when he last visited the shop on some unspecified date; and that he had no reason to believe that the bee sting the deceased suffered happened anywhere other than at the employer's premises.

There is no beneficiary issue on appeal as the parties stipulated that the claimant is the only beneficiary of the deceased for workers' compensation purposes and the hearing officer so found. With respect to the compensability issue, the hearing officer made the following findings of fact and conclusions of law:

FINDINGS OF FACT

5. Decedent was fatally injured by a bee sting to his tongue on _____ while he was at work for Employer.

6. Decedent was stung on the tongue by a bee or some other stinging insect while he was drinking from a Coke can on _____.

7. Decedent was engaged in the repair of one of Employer's vehicles at the time he took the fatal drink on _____.

8. Decedent died of complications resulting from his body's reaction to the bee sting.

9. Drinking a Coke was not a work activity required of Decedent's employment.

10. Decedent was not engaged in any work activity of Employer's at the moment of injury.

11. Decedent's injury did not involve anything owned or controlled by Employer.

12. Decedent's injury was of a kind all people are at risk of suffering because this was a risk confronted irrespective of any type of employment.

13. The evidence did not establish that there was an increased risk of bee sting at Employer's premises in [city].

14. There is no evidence that Decedent's injury was caused by an instrumentality essential to the work of Employer or necessary to the accomplishment of Employer's mission.

CONCLUSION OF LAW

3. The injury which led to Decedent's death on _____ did not arise out of his employment, and is therefore not compensable.

The claimant asserts that the hearing officer had no authority to decide that the decedent's injury did not arise out of his employment because she asserts that the carrier contested benefits only under the act of God exception in Section 406.032, and that the act

of God exception does not apply to a bee sting under case law. Since there was no issue presented at the CCH with respect to the specific grounds for the carrier's denial of benefits, we will not address that matter for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. We do note, however, that the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), which was not introduced into evidence at the CCH, but a copy of which is attached to the claimant's appeal, states as a reason for refusal of payment of benefits that there was no injury in the course and scope of employment. Considering that one issue at the CCH was whether the deceased suffered a compensable injury which resulted in his death, and that there was no issue with regard to the specific grounds for disputing compensability, we find no merit in the claimant's contention that the hearing officer had no authority to determine that the claimant's injury did not arise out of his employment.

Sections 401.011(10) and (12) provide as follows:

> (10) "Compensable injury" means an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle.
>
> (12) "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. . . .

In Deatherage v. International Insurance Company, 615 S.W.2d 181, 182, (Tex. 1981), the court stated that, "[a]s a general rule, a claimant must meet two requirements: (1) the injury must have occurred while the employee was engaged in or about the furtherance of the employer's affairs or business; and (2) the claimant must show that the injury was of a kind and character that had to do with and originated in the employer's work, trade, business or profession." In Lumberman's Reciprocal Ass'n v. Behnken, 246 S.W. 72, 73 (Tex. 1922), the court stated that "[a]n injury has to do with, and arises out of, the work or business of the employer, when it results from a risk or hazard which is necessarily or ordinarily or reasonably inherent in or incident to the conduct of such work or business." The court also noted at page 74 that the workers' compensation law is a remedial statute which should be liberally construed with a view to accomplishing its purpose and to promote justice. In Texas Employers' Ins. Ass'n v. Anderson, 125 S.W.2d 674, 677 (Tex. Civ. App.-Dallas 1939, writ ref'd), the court observed that whether an employee sustained an injury while in the course of his employment must be determined on the peculiar facts of each case and as a question of fact.

Section 406.032 provides, in part, that an insurance carrier is not liable for compensation if the injury arose out of an act of God, unless the employment exposes the employee to a greater risk of injury from an act of God than ordinarily applies to the general public. In Travelers Insurance Company v. Williams, 378 S.W.2d 110 (Tex. Civ. App.-Amarillo 1964, writ ref'd n.r.e.), the court held that a wasp sting is not an act of God within the workers' compensation statute.

Several Texas workers' compensation cases have addressed injuries from insect bites or stings. In Indemnity Ins. Co. of North America v. Garsee, 54 S.W.2d 817 (Tex. Civ. App.-Beaumont 1932, no writ), the employee, whose job it was to clean out the bathhouse, was bit by an insect when he stuck his arm into a barrel in the bathhouse to get old clothes to wrap around a hose to clean out the sewer outlet in the bathhouse. The court held that the operation of the bathhouse was part of the business of the employer and that the record established the fact that the insect bite resulted from an effort on the part of the employee to discharge in an orderly way the duties of his employment and thus the risk or hazard in the case fell within the rule announced in Behnken, *supra*. In upholding a judgment in favor of a claimant who suffered a stroke when she was berated by a customer, the court in Aetna Insurance Company v. Hart, 315 S.W.2d 169, 174 (Tex. Civ. App.-Houston 1958, writ ref'd n.r.e.) cited the Garsee case when it stated:

> A person may fall on the floor at work and injure himself; he might have fallen elsewhere and received the same injury, but the fact is he did not. The injury, however, is compensable. An employee may be stung by a wasp in the performance of his work; he might have been stung elsewhere, but if in the performance of his duties he receives the injury he is to be compensated. [Citing Garsee, *supra*.].

In Williams, *supra*, the employee was a forklift operator, and, in the process of operating the forklift, he was stung by a wasp on his ankle and he died the next day of an acute coronary occlusion. The court held that a wasp sting is not an act of God, therefore, the trial court did not err in refusing to submit an issue to the jury as to whether the deceased employee was exposed to a greater hazard in his employment than ordinarily applies to the general public. The court held that it was evident that the injury was sustained while the deceased employee was engaged in his employer's business. On the question of whether the injury was of a kind and character that had to do with and originated in the employer's work, trade or business, the court noted that there was evidence that wasps were commonly seen about the employer's premises, that other employees had been stung by wasps while on the same job, and that the deceased employee was stung while in the actual performance of his duties. The court held that it was clear that the wasp sting was a risk or hazard of the deceased employee's employment and was compensable. The court also found that there was sufficient evidence to support a causal connection between the wasp sting and the coronary occlusion which caused the employee's death.

Another insect case is Standard Fire Insurance Company v. Cuellar, 468 S.W.2d 880 (Tex. Civ. App.-San Antonio 1971, writ ref'd n.r.e.). In that case the injury resulted from an insect sting received by a furniture store truck driver while he was returning from a delivery in the employer's truck with the window rolled down on a warm day. The insect bit the employee on the upper lip causing much swelling to his face and other physical problems. The court agreed with the carrier's contention that it is not alone sufficient to show that the employee was injured while engaged in or about the furtherance of his employer's business, but he must also show that his injury was of such a kind and character as had to do with and originated in the employer's work, trade, business or profession. The court then stated that the evidence established that the insect bite sustained by the employee resulted from the effort on his part to discharge in an orderly way the duties of his employment, that he was stung while in the performance of his duties of employment, and that he was subjected to this risk by carrying out his designated duties. The court held that it was clear that the insect sting was a risk or hazard of the employee's employment and was compensable.

A number of Texas cases deal with the personal comfort doctrine. In Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243, 245 (Tex. 1985), the court stated that "[a]n employee need not have been engaged in the discharge of any specific duty incident to his employment; rather an employee in the course of his employment may perform acts of a personal nature that a person might reasonably do for his health and comfort, such as quenching thirst or relieving hunger; such acts are considered incidental to the employee's service and the injuries sustained while doing so arise in the course and scope of his employment and are thus compensable." Yeldell was a nurse sitting at her duty station on her regular shift when she called her daughter. As she hung up the telephone, the cord became entangled in a coffee urn that overturned, spilling hot coffee on her resulting in second and third degree burns. The court held that the trial court did not err in holding that, as a matter of law, Yeldell was within the course and scope of her employment. The court stated that the workers' compensation act should be liberally construed in favor of the employee and that it should not be hedged about with strict construction, but should be given a liberal construction to carry out its evident purpose.

In Texas Employers' Insurance Association v. Prasek, 569 S.W.2d 545 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.), the court noted that the fact that an employee is injured while at work or on the premises of the employer does not in and of itself make the injury compensable. However, the court went on to hold that the claimant in that case, who was a tool pusher at an oil field site, suffered an injury incidental to and originating in his employment when he choked to death on a piece of steak while eating in a company trailer house which was provided for employees as a place to sleep and eat when required to be at the well site during crucial drilling stages, whether or not the employer furnished the meal. The court stated that there was ample evidence that the employee, at the place of injury and at the time he sat down to eat his meal, was then and there engaged in an act incident to his employment; that is, the act of eating his meal at the trailer house was

connected with the work he was employed to do for his employer. Another personal comfort doctrine case is Liberty Mutual Insurance Co. v. Hopkins, 422 S.W.2d 203 (Tex. Civ. App.-Beaumont 1967, writ ref'd n.r.e.), in which the court held that injuries sustained by the claimant in that case as a result of being beaten up by a coworker who became angry when he thought the claimant was stepping ahead of him in line at the drinking fountain maintained by the employer were compensable.

The claimant in the instant case contends that there is a contradiction between the hearing officer's discussion of the evidence and Finding of Fact No. 10, and that Finding of Fact No. 10 is in conflict with Finding of Fact No. 7. In the discussion of the evidence section of his decision, the hearing officer states: "There is no doubt an injury occurred. There is also no doubt that Decedent was in the course and scope of his employment at the time, whether actually so or through the personal comfort doctrine is not important." In Finding of Fact No. 7 the hearing officer found that the deceased "was engaged in the repair of one of Employer's vehicles at the time he took the fatal drink on _____," and in Finding of Fact No. 10 the hearing officer found that the deceased "was not engaged in any work activity of Employer at the moment of injury." The claimant further contends that the evidence conclusively established that the deceased was in the course and scope of his employment at the time he suffered his injury.

In my opinion, the evidence establishes as a matter of law that the deceased was injured in the course and scope of his employment. The hearing officer's finding that the deceased was engaged in the repair of one of the employer's vehicles at the time he took the fatal drink is unchallenged on appeal. Under the holding in Yeldell, the deceased's act of quenching his thirst by drinking a Coke at the employer's shop while he was engaged in the repair of the employer's truck is considered to be incidental to the deceased's service. Furthermore, under the Yeldell case, it matters not that the deceased was quenching his thirst at work at the very moment of injury and that he was not engaged in the discharge of any specific duty incident to his employment. The facts of the case fall squarely within the personal comfort doctrine. There is no evidence or fact finding to indicate that the deceased had deviated from the course and scope of his employment at the time of his injury such as there was in Ranger Insurance Company v. Valerio, 553 S.W.2d 682 (Tex. Civ. App.-El Paso 1977, no writ) where the court held that the employee sustained a noncompensable injury when he was electrocuted while chasing a rabbit. According to the Behnken case, an injury has to do with, and arises out of, the work or business of the employer, when it results from a risk or hazard which is necessarily or ordinarily or reasonably inherent in or incident to the conduct of such work or business. Here, the bee which stung the deceased was on the employer's premises and, under the rationale set forth in the cases of Garsee, Williams, and Cuellar, the bee represented a risk or hazard which was incident to the deceased's work. In my opinion, application of the positional risk test to the facts of this case supports a holding of compensability. According to Employers' Casualty Company v. Bratcher, 823 S.W.2d 719 (Tex. App.-El Paso 1992, writ denied), the positional risk test focuses the court's inquiry upon whether the injury would have occurred

if the conditions and obligations of employment had not placed the claimant in harm's way. In Walter v. American States Insurance Company, 654 S.W.2d 423 (Tex. 1983), the court cited cases, including the Williams wasp-sting case, in which courts have upheld awards on the positional risk theory because the employment brought the employee in contact with the risk that in fact caused the injury.

I do not agree with the carrier's assertion that the definition of injury in the course and scope of employment set forth in the 1989 Act makes inapplicable the old law insect sting cases or that the use of the word "activity" in the definition of course and scope in the 1989 Act requires a finding against the claimant. The 1989 Act did not do away with the personal comfort doctrine. *See* Texas Workers' Compensation Commission Appeal No. 94079, decided February 28, 1994. In addition, we have held that the current law's definition of course and scope is nearly identical to that contained in the prior law. *See* Texas Workers' Compensation Commission Appeal No. 92227, decided July 20, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 931083, decided January 10, 1994; Texas Workers' Compensation Commission Appeal No. 941436, decided December 7, 1994. I also disagree with the carrier's assertion that our decisions in Texas Workers' Compensation Commission Appeal No. 93956, decided December 8, 1993, and Texas Workers' Compensation Commission Appeal No. 941056, decided September 21, 1994, are factually similar to this case. Appeal No. 93956 involved an injury to the claimant's back when pulling up her pants after using the bathroom at work. Appeal No. 941056 involved a back injury from sneezing at work. We held those injuries to be noncompensable. However, neither of those cases involved a risk or hazard which was incident to the work. Furthermore, I cannot agree with the carrier's contention that the injury must involve some "instrumentality" of the employer. If that were the law then the claimant in Prasek would not have prevailed. Lastly, I totally disagree with the carrier's assertion that the present case is similar to a case involving an act of God exception. The court in Williams held that a wasp sting is not an act of God under the workers' compensation law. Thus, it was not necessary for the deceased in this case to prove that he was exposed to a greater risk of injury than ordinarily applies to the general public.

The hearing officer's decision and order on the compensability issue are reversed and a new decision is rendered that the deceased suffered a compensable injury on

_____, which resulted in his death. The claimant, as the only legal beneficiary for workers' compensation purposes, is entitled to death benefits.

_____
Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in the result reached by Judge Potts under the particular facts of this case. However, I do not view the very ably written principal opinion as pronouncing some absolute or *per se* rule of law to the effect that any insect bite sustained by an employee in the workplace results in a compensable injury under the 1989 Act.

I would first point out that the exceptions to a carrier's liability for compensation contained in Section 406.032, with the apparent exception of an act of God, may be as applicable to insect bite injuries as to other types of injury. These exceptions include intoxication, an employee's willful attempt to injure himself or unlawfully injure another, the personal animosity of a third person, voluntary participation in an off-duty recreational, social or athletic activity not constituting a part of the work-related duties, and horseplay.

I would further point out that, in Commercial Standard Insurance Company v. Marin, 488 S.W.2d 861, 869 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e.), the San Antonio court stated with respect to its decision in Cuellar, *supra*, that "the basis for our conclusion that the insect sting was a compensable injury is, like the street risk and travel risk cases, clearly based on the `positional risk' or `but-for' doctrine. It should be noted that the *Cuellar* opinion, by way of footnote, refers, not disapprovingly, to *Vivier* and *Shook*. 468 S.W.2d at 883, ftnt.1."

Finally, I would point out that unlike the facts in Garsee, Williams and Cuellar, *supra*, the cases relied on by Judge Potts, this case involves the application of the "personal comfort doctrine," as Judge Potts recognizes. However, the court, in U.S. Fidelity and Guaranty Company v. Slaughter, 836 S.W.2d 745, 748 (Tex. App.-El Paso 1992, no writ), stated the following: "In a very recent [case] the personal convenience doctrine was further refined. That case characterized the doctrine as one where a claimant must actually satisfy a two-prong test: that the injury occurred within the course and scope of the job, *and* that the injury would not have occurred *but for* the conditions and obligations of employment which placed the employee in danger. Employers' Casualty Company v. Bratcher, 823 S.W.2d 719, 721 (Tex. App. -El Paso 1992, writ denied)."

Philip F. O'Neill
Appeals Judge

DISSENTING OPINION:

I respectfully dissent from the well-written principal opinion as I believe its holding effectively imposes absolute liability on an employer in an insect bite or sting situation at work except, perhaps, for affirmative defense situations set out in the concurring opinion. I recognize the court in Cuellar, *supra*, citing other cases, may have already gone down this path with the statement, not supported by any apparent evidentiary recitation, that "[w]e think it clear that the insect sting was a risk or hazard of his employment and is compensable." This matter seems to me to be more appropriately a question of fact for the fact finder. However, common to these cases was the circumstance that, at the very time of the insect bite, the injured worker was actually performing his duties. In the case under review, as aptly set out in the principal opinion, the decedent was engaged in quenching his thirst when stung, bringing into consideration the so-called "personal comfort doctrine." A line of cases, as noted, have held that an incidental comfort break does not remove an employee from the course and scope of employment. However, I do not believe it necessarily follows that anything that occurs or any injury that results from or during a comfort break constitutes an injury in course and scope, and hence is compensable. There is support, as cited, for the determination that the decedent in breaking for a drink of Coca-Cola would generally fall in the personal comfort doctrine and be within the course and scope of his employment. However, in this case another nonemployer-related instrumentality was injected into the scenario which, in my opinion, supports the hearing officer's factual determination that the injury was not compensable and his conclusion that the injury did not arise out of his employment. The presence of an insect in the decedent's Coca-Cola at the time he took a break to take a drink, a step removed from those cases cited where the injured employee was stung or bitten as he actually performed work-related duties, requires further analysis. At that point, it would not appear that the insect was clearly "a risk or hazard of the employment." Rather, the bee in the decedent's Coca-Cola might well have been found to have had nothing to do with the employment. This, the hearing officer so found and I believe his determination is not so against the great weight and preponderance of the evidence as to support reversal. In my opinion, this was a factual matter and I do not agree with a holding that it is a compensable injury as a matter of law under these circumstances. That result, it seems to me, is stacking so-called liberal interpretation found in cases concerned with the inherent risk or hazard of employment, the personal comfort doctrine, and the positional risk test, and ending up with an absolute result. This to me is akin to the impermissible stacking of one assumption or inference upon another to arrive at an ultimate fact. *See* Texas Workers' Compensation Commission Appeal No. 93731, decided October 4, 1993; Wells v. Texas Pacific Coal & Oil Company, 140 Tex. 2, 164 S.W.2d 660, 663 (1942). The hearing officer determined that an insect in

the decedent's Coca-Cola, the instrument of the injury here, was a risk anyone might well confront outside of employment, and was not a risk or hazard of the employment. I would affirm the decision.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge