

APPEAL NO. 960846
FILED JUNE 14, 1996

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On April 11, 1996, a contested case hearing (CCH) was held in (City), Texas, with (hearing officer) presiding. In response to the issues before him, the hearing officer determined that the deceased employee (deceased), had sustained a compensable injury on (date of injury) (all dates are 1994 unless otherwise noted), that resulted in the deceased's death on (date). Issues dealing with the carrier's timely contest of compensability and the deceased's average weekly wage were resolved by stipulation and are not appealed issues before us.

Appellant (carrier) appeals, asserting that the deceased deviated from his employment during an afternoon break and that the "personal comfort doctrine" does not apply because the personal comfort doctrine is limited to "activities that only the employee can perform himself." Carrier cites three court cases as precedent. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, beneficiary of the deceased (claimant) urges affirmance, citing several Appeals Panel decisions.

DECISION

We reverse and render a new decision that the deceased did not sustain a compensable injury.

The background facts are essentially undisputed. The deceased was apparently employed by a plumbing manufacturer as a "parts bagger" for many years. Claimant apparently had a preexisting heart condition and wore a pacemaker. On (date of injury), deceased asked a coworker, (SM), for help in jump-starting his car, which was parked in the employer's parking lot some hundred feet or so from where deceased normally worked. Over the lunch period, SM went home and got his jumper cables and, at the afternoon break at 2:00 p.m., deceased, SM and another coworker, (BH), went to the parking lot to jump-start deceased's car. SM had raised the hood of his truck and deceased had raised the hood of his car. The jumper cables had been attached when the deceased fell backwards, striking his head on the ground. SM's testimony, photographic copies and a supervisor's testimony all verified the presence of some "flagging tape" in the area where deceased had been standing. Claimant's attorney speculates that the "most likely" assumption was that claimant fell over the flagging tape. Deceased was taken to a hospital emergency room (ER), treated and released in spite of complaining of headaches, nausea and vomiting. Claimant came to the employer's premises and took deceased home. At 8:00 p.m. that evening, deceased still had severe headaches and nausea. Claimant called the ER and was told to give the deceased Tylenol, which she did throughout the night. The following morning, deceased was taken to see his family physician and, while in the doctor's office, suffered a seizure. Deceased was taken to a different hospital, and a CT scan revealed an "intercerebral [sic] hematoma." Deceased died shortly thereafter. The

death certificate shows the immediate cause of death as "Blunt trauma injury to head." The summary of the autopsy report (signed by (Dr. B)) concludes:

The decedent most likely developed a ventricular arrhythmia secondary to his severe coronary arteriosclerosis and arteriosclerotic cardiomyopathy. He then, by history, collapsed and struck his head with subsequent development of the above described cerebral hematoma. Evaluation of the decedent's pacemaker revealed it to be operating properly.

Claimant argues that the jump-starting incident is covered under the personal comfort doctrine. Carrier asserts that the deceased "embarked on a deviation from employment during his break and was engaged in the deviation at the time of his fall." The testimony was that breaks were used to go to the bathroom, get a drink and relax. There was no company policy, one way or the other, regarding going to the parking lot (or a store next door) during breaks. In holding that deceased sustained a compensable injury, the hearing officer reviewed several Appeals Panel decisions and made factual determinations that "the efforts to jump-start the car were necessary for the health, comfort and convenience of the [deceased]," and the deceased was "on the clock" and "on company property when he fell."

Many of the Appeals Panel decisions on the personal comfort doctrine cite 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION (various editions). LARSON, § 21, 1996 edition, generally states:

Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred.

The personal comfort doctrine has been applied to the Texas Workers' Compensation law in the Texas Supreme Court case of Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701. S.W.2d 243 (Tex. 1985), where the court stated:

An 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.

Although factually distinguishable, Texas Workers' Compensation Commission Appeal No. 950057, decided February 24, 1995, discusses the personal comfort doctrine thusly:

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. . . . 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 . . . [See *also* Appeal No. 91019, *supra*] 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."

Carrier cites Ranger v. Bolero, but actually means Ranger Insurance 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. The court held that the worker had left the course and scope of employment and was on a personal deviation.

Carrier also cites Roberts v. Texas Employers' Insurance Ass'n, 461 S.W.2d 429 (Tex. Civ. App.-Waco 1971, writ ref'd), a case where an employee was injured on the employer's premises during working hours. 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 to when the injury occurred. She was engaged on a purely personal mission, and the injury was not compensable. [Citations omitted.]

That case was cited, and followed in Texas Workers' Compensation Commission Appeal No. 94089, decided February 14, 1994, a case where an employee, during working hours,

asked the employer if he could have some plywood crating. The employer gave the employee approval to take the crating and the employee, while placing the plywood in the bed of his pickup, jumped from the pickup, sustaining an injury. The Appeals Panel affirmed the decision of the hearing officer that the employee had deviated from his employment and the injury was not compensable.

Carrier also cites Lesco Transportation Co. v. Campbell, 500 S.W.2d 238 (Tex. Civ. App.-Texarkana 1973, no writ), a case where an employee had deviated from his employment while changing the oil in a truck. We distinguish that case from the facts before us because Lesco was a course and scope of employment case not dealing with the personal comfort doctrine. Claimant, on the other hand, cites Texas Workers' Compensation Commission Appeal No. 93484, decided July 30, 1993, a case where the Appeals Panel held that an employee who was injured tossing a football while on break was compensable under the personal comfort and "recreational social activities" doctrine. Claimant contends that "if tossing a football during a break is considered to be in the course and scope of employment then certainly an employee who is injured when he falls on the premises of the employer, during a 10 minute break, with the implied permission to jump-start his vehicle, not directly injured by the jump-starting of the vehicle, certainly falls within the confines of personal comfort doctrine." We disagree.

As has been noted in the cited cases, traditionally, activities such as eating, drinking to quench thirst, using toilet facilities, smoking (see Texas Workers' Compensation Commission Appeal No. 94559, decided June 10, 1994, bus driver on a smoke break found compensable)¹ and recreating (see Texas Workers' Compensation Commission Appeal No. 941693, decided January 27, 1995, for compensable basketball play on break, as well as Appeal No. 93484, *supra*) or relaxing are covered. The testimony in the instant case was that breaks were used to "go to the bathroom, get a drink," relax and go to the "lunch room." Injuries which occur during those types of activities are generally compensable as furthering the interests of the employer by having an employee whose personal needs have been attended to, and a relaxed, arguably more efficient, employee, ready to return to work. On the other hand, when an employee uses his break to attend to personal business, chores or errands, even with the express or implied permission of the employer, those cases are more likely to constitute a deviation from the employment. See Valerio, *supra*, chasing a rabbit, Roberts, *supra*, loading a box in the employee's vehicle, and Appeal No. 94089, *supra*, loading scrap plywood in the employee's pickup for personal use. We find the instant case much closer to Appeal No. 94089, *supra*, than to Appeal No. 93484, *supra*. The key distinction we make is whether the employee was engaged in such activities which would address a brief, incidental personal comfort need such as, as stated in Yeldell; thirst, hunger, smoking, etc., or whether the employee was pursuing a purely personal mission unassociated with the employment. In the instant case, we find, as a matter of law, that the Finding of Fact No. 5 is incorrect and consequently we find that the deceased's injury was not compensable.

¹For a detailed discussion of the various activities included under personal comfort doctrine, see LARSON, *supra*, Vol 1 § 21.00, pp 5-5 through 5-71 (Matthew Bender 1996).

We hereby reverse the decision and order of the hearing officer and render a new decision that the deceased did not sustain a compensable injury under the personal comfort doctrine.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge