APPEAL NO. 962581
FILED FEBRUARY 5, 1997

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 19, 1996, in [City], Texas, with [hearing officer] presiding as hearing officer. He determined that the appellant (claimant herein) was not injured in the course and scope of his employment on [date of injury], and that he did not have disability. The claimant appeals these determinations, urging legal error on the part of the hearing officer. The respondent (carrier herein) replies that the decision is correct and should be affirmed.

DECISION

Affirmed.

The essential facts of this case are not disputed. The claimant worked as a tractor operator. He was paid for the half-hour allowed each workday for lunch. The employer maintained a lunch room with a table, snack machine and microwave oven for the use of employees who wished to remain on the premises for lunch. However, no employee was directed where to eat lunch. Employees were required to take lunch breaks in staggered shifts so that production activities were not interrupted. On [date of injury], the claimant left the premises of the employer by bicycle to eat at his home, which he estimated to be approximately one mile from his place of employment. The bicycle was his own personal property. While traveling along a public highway on his bicycle, he was struck shortly before 1:00 p.m. by a pick-up truck and thrown from his bicycle. As a result of this collision, claimant sustained physical injuries and did not return to work until October 1, 1996. He testified that he was not directed by his supervisor to eat lunch at home that day.

[Mr. E], the general manager, testified that the employer does not require employees to clock-out for lunch and that they are paid for the time spent at lunch. This, according to Mr. E, is of mutual benefit to the employee and employer because it allows flexibility in maintaining a production staff at all times. He described this feature as "fringe benefit" for employees. He agreed that the claimant left for lunch on this date after the normal noon lunch hour to accommodate the production at the plant and also to allow the claimant an uninterrupted lunch. It was his opinion than an employee who gets paid for time spent at lunch "may work a little better" than an employee who does not get paid for this time.

An injury is generally compensable if it occurs in the course and scope of employment. Section 401.011(12) defines course and scope of employment as "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." These two requirements are cumulative and neither alone is sufficient to establish that an activity is in the course and scope of employment. *See* Texas Workers' Compensation Commission Appeal No. 94961, decided September 1, 1994. Such activity can occur either on or off the premises of the employer, but generally does not include transportation to and from the place of employment except where the transportation is furnished by or under the control of the employer or the employee is directed by the employer to proceed from one place to another. Other exceptions do not apply in this case.

The claimant argued both at the CCH and on appeal that the "personal comfort" doctrine should apply in this case to bring his injuries within the course and scope of his employment. That doctrine, as enunciated by the Texas Supreme Court in Yeldell v. Holiday Hills Retirement and Nursing Center, Incorporated, 701 S.W.2d 243 (Tex. 1985), and quoted in Texas Workers' Compensation Commission Appeal No. 93956, decided December 8, 1993, which also discussed several other cases, provides:

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 may 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.

The claimant urges that the personal comfort doctrine applies in his case despite the fact that he was injured off the employer's premises while riding his own bicycle home for lunch because he was being paid during this period of time and because, as Mr. E testified the claimant was furthering the employer's business by enhancing the efficiency of the employer through a "well-fed workforce" and the use of staggered lunch breaks. He argues that the application of this doctrine is not limited to injuries suffered on the employer's premises and cites as authority for this proposition 1 Larson, Law of Workmen's Compensation, Section 15.52, and cases from other jurisdictions, including primarily California.

Because the claimant in this case was injured on his way home to lunch on a public highway and not on the employer's premises, we do not consider those cases that address the applicability of the personal comfort doctrine in the context of an on-premises lunch or where the injured employee is assigned job duties away from home or from his normal work site and is injured going to or from a meal to be dispositive of

the issue as framed by the claimant in this case. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 94961, *supra*; Texas Workers' Compensation Commission Appeal No. 950973, decided July 31, 1995; Texas Workers' Compensation Commission Appeal No. 94079, decided February 28, 1994; and Texas Workers' Compensation Commission Appeal No. 91019, decided October 3, 1991. In Texas Workers' Compensation Commission Appeal No. 941362, decided November 28, 1994, the Appeals Panel affirmed the determination of a hearing officer that the claimant was not injured in the course and scope of his employment. The claimant in that case was not paid for the time he spent eating lunch, but presumably (though it was not altogether clear) was paid for the time driving to and from lunch in an employer-owned vehicle. He was injured in a motor vehicle accident on the way back from lunch. The claimant argued that his injury was compensable because he was being paid to drive from lunch to another job location which made the personal comfort doctrine applicable to bring his injury within the course and scope of his employment. The Appeals Panel found that the personal comfort doctrine did not apply in that case because the claimant voluntarily chose to leave the job site for lunch.[1] Although one could arguably infer from this decision that the personal comfort doctrine in Texas only applies to injuries occurring on the employer's premises or at the job site, Chief Judge Sanders, in Texas Workers' Compensation Commission Appeal No. 950057, decided February 24, 1995, discussed the provisions of Larson relied on by the claimant in the case we now consider and wrote:

> 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 were he pleased. <u>There are no special or exceptional circumstances present here which would cause the personal comfort doctrine to apply</u>. [Emphasis added.]

This suggests that in an appropriate case of "special or exceptional circumstances" the personal comfort doctrine may apply in the case of an off-premises lunch as suggested by Larson. The question thus becomes whether such circumstances exist in the case we now consider. The claimant identifies these circumstances to be the employer's preference for a "well-fed" workforce and the employer's willingness to pay the claimant for the time he spent at lunch thus giving the employer flexibility in determining when certain employees may take a lunch break. We consider the former argument to be of such general applicability to workers everywhere that it hardly qualifies as a special circumstance. Similarly, the desirability for an employer to have some flexibility in the assignment of work, including when that work is to be performed, seems to us to be an ordinary consideration in employment generally. The fact that this employer is willing to

[1]The Appeals Panel also concluded that the claimant did not otherwise meet the two-pronged test for establishing that he was in the course and scope of his employment.

pay for the time spent eating is significant in terms of the wages, or as described in this case, the "fringe benefits" paid the employees and suggests no more than that some employers pay higher wages than others. Thus, assuming for purposes of this case that the personal comfort doctrine can apply in the context of going to lunch off-premises under exceptional or special circumstances, we find none in this case.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge