APPEAL NO. 991231

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 31, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) was not in the course and scope of his employment at the time of his injury on _____; that his horseplay was not a producing cause of the alleged injury and did not relieve the respondent (carrier) of liability; and that the claimant did not have disability within the meaning of the 1989 Act because he did not sustain a compensable injury. In his appeal, the claimant asserts that the hearing officer's determinations that he was not in the course and scope of his employment at the time of his injury and that he did not have disability are against the great weight of the evidence and asks that we reverse and render a decision in his favor on both issues. In its response, the carrier urges affirmance. The carrier did not appeal the determination that the claimant's horseplay was not a producing cause of his alleged injury.

DECISION

Reversed and a new decision rendered that the claimant was in the course and scope of his employment at the time of his injury and that he had disability for the period from October 29, 1998, to March 20, 1999.

The facts in this case are largely undisputed. The claimant testified that on _____, he was employed as a gauger monitoring and maintaining gas wells for the employer. Many of the wells are located on remote ranches, where the employer maintains leases. The claimant stated that on October 28th, he was at a ranch changing the charts on the well. He testified that he was standing next to his company pickup truck completing the charts with the readings he had taken. He stated that he was using the bedside toolbox as a writing surface; that a wind came up and blew the charts into the bed of the pickup; that he reached in to retrieve the charts; and that as he did so, he was bitten on the middle finger of his right hand by a rattlesnake. In an unchallenged finding, the hearing officer determined that "[o]n or about (date), [three days before the injury] while he was supposed to be performing duties of a gauger, the Claimant caught a rattlesnake and placed it in a wire cage in the bed of his pickup which was used to carry out his duties."

As noted above, the carrier did not appeal the hearing officer's determination that horseplay on the part of the claimant was not a producing cause of his injury. The hearing officer noted in his discussion that the "horseplay involved was the catching of the snake" and that it had ended by the time of the injury; thus, he concluded that the "facts of this case did not suggest that the Claimant was injured while he was engaged in horseplay."

The key question in this case is whether the claimant was in the course and scope of his employment at the time he was bitten by the rattlesnake. Section 406.031(a) provides:

> An insurance carrier is liable for compensation for an employee's injury *without regard to fault or negligence* if:

(1) at the time of the injury, the employee is subject to this subtitle; and
(2) the injury arises out of and in the course and scope of employment. (Emphasis added.)

In relevant part, Section 401.011(12) defines the phrase "course and scope of employment," as follows:

> [A]n 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 hearing officer determined that the claimant was not in the course and scope of his employment at the time of his injury. He made the following findings of fact in support of that legal conclusion:

FINDINGS OF FACT

3. Neither the capturing or the keeping of the rattlesnake were activities of the kind or character that had to do with or originated in the work, business, or trade of the employer.

4. On _____, the Claimant reached in to [sic] the bed of his pickup to retrieve some work papers and was bitten by the rattlesnake through the wire cage.

5. The Claimant was bitten by the rattlesnake due to his own personal activities which were done in order to further his own financial affairs and not for the furtherance of the affairs of his employer.

In addition, in the discussion section of his decision, the hearing officer stated:

> Clearly, while the Claimant was filling out charts of the readings that he had taken he was in the course and scope of his employment. However, when the Claimant reached into the bed of the pick-up and was bitten by a rattlesnake he was not. Reaching into the pick-up to retrieve the charts ordinarily would not be an activity that would expose the Claimant to being bitten by a rattlesnake that was in a cage. The Claimant, on his own, caught the snake and kept the snake in the bed of his pick-up. Neither of those activities were the kind or character that had to do with, or originated in, his work. Catching the snake and keeping it in the bed of his pick-up were not activities that he performed as an employee while engaged in or about the furtherance of the affairs of the Employer. It was the Claimant's own personal financial reasons that caused him to capture and keep the snake in

his pick-up. The Claimant's own personal affairs rather than the business affairs were being furthered by these activities. Additionally, solely because of the Claimant's purely personal activities, he was exposed to a poisonous snake in the bed of his pick up. The simple activity of reaching into the bed of the truck would not have otherwise caused an injury such as the one sustained by the Claimant.

A careful review of the above-quoted factual findings and the hearing officer's discussion section, demonstrates that he introduced concepts of fault and negligence in this case in direct contravention of Section 406.031(a). While we do not disagree with the hearing officer's assessment that the activity of capturing and keeping the snake was not an activity that had to do with or originated in the employer's business or his determination that that activity furthered the claimant's own financial affairs rather than the affairs of the employer, we cannot agree that those determinations inescapably lead to the conclusion that the claimant was not in the course and scope of his employment in this instance when he was bitten by the rattlesnake. The activity of keeping the snake was not the only activity in which the claimant was engaged at the time of the injury. To the contrary, the claimant was also reaching into the truck to retrieve the charts that had blown out of his hands as he was entering the data from the readings he had taken on them. The hearing officer stated in his discussion that the claimant was "clearly" in the course and scope of his employment while he was filling out the charts. We agree; however, in light of that determination, we find no basis for removing the activity of regaining control of the document, which it was the claimant's job to complete, from the course and scope of employment. It seems axiomatic that if the activity of completing the chart originates in the business of the employer and furthers its affairs, the act of retaining control over the chart likewise does so. Accordingly, we reverse the hearing officer's determination that the claimant was not in the course and scope of his employment at the time of his injury and render a new decision that he was in the course and scope of his employment at the time of his injury.

The hearing officer made an unchallenged factual finding that "[d]ue to the claimed injury, Claimant was unable to obtain and retain employment at wages equivalent to the Claimant's pre-injury wage beginning on October 29, 1998 and continuing through March 20, 1999." However, he concluded that the claimant did not have disability because he did not sustain a compensable injury. Given our reversal of the hearing officer's course and scope determination and our rendering of a new decision that the claimant did sustain a compensable injury, we similarly reverse the disability determination and render a new decision that the claimant had disability for the period from October 29, 1998, to March 20, 1999.

We are not unmindful that the determination that the claimant was in the course and scope of his employment at the time of the snake bite may be somewhat controversial. There is a certain facial appeal in the proposition that because the claimant introduced a dangerous instrumentality into the workplace, which was unrelated to the employer's business, he should be excepted from receiving workers' compensation benefits. However, it is well-settled that negligence or fault on the part of the claimant does not bar recovery. Section 406.031. If the hearing officer had determined that the claimant was injured

catching the snake or doing anything to or with the snake, there is little doubt that such activity would be determined to be a deviation from the course and scope of employment. However, that did not happen in this instance. To the contrary, the hearing officer found that at the time of the injury, the claimant was reaching into the bed of the truck to retrieve the chart he was filling out as part of his job duties. That activity is an activity that originates in the employment and furthers the affairs of the employer and, as such, it is an activity within the course and scope of his employment. An argument could be made that the catching and keeping of snakes is an activity of such a nature that on-the-job injuries associated with that activity are not properly compensated under workers' compensation. However, to except such conduct from compensation would require legislative action. *See* Section 406.032. In the absence of any such action, and in light of the prohibition of considering fault or negligence on the part of the claimant in determining liability for workers' compensation benefits, no basis exists for our creating such an exception. *See, e.g.,* Rodriguez v. Service Lloyds Ins. Co., 42 Tex. Sup. Ct. J. 900 (July 1, 1999).

The hearing officer's decision and order are reversed and a new decision is rendered that the claimant was in the course and scope of his employment at the time of his injury and that he had disability from October 29, 1998, to March 20, 1999. Accrued and unpaid benefits are to be paid in a lump sum with interest.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Judy L. Stephens
Appeals Judge