APPEAL NO. 051212
FILED JULY 13, 2005

This appeal arises 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 April 26, 2005. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury while in the course and scope of his employment on _____, and that the claimant does not have disability.

The claimant appealed, contending that he "was just doing my job and doing what my supervisor had asked me to do" and that he has had disability "until 5-12-05." The respondent (carrier) responds, urging affirmance.

DECISION

Reversed and a new decision rendered.

The claimant, an 18 year old, was employed as a "loader," (clerk or associate) at a toy store on _____. On that day two boys, aged 13-15 years old had been in the store and had been suspected of shoplifting. Either when they came in again, or while they were in the store, the assistant manager on duty (Ms. L) told the claimant and another clerk/associate to "over service" the boys which meant "that you need to stay on them, overservice them, stay within sight of them at all times, essentially follow them through guest service policies." The claimant testified that Ms. L told him "to follow [the boys] around the store and not to let them leave the store with anything stolen." (TR pages 13, 15.) At some point near closing, the boys began to run out of the store and the claimant (and the coworker) began to run after the boys. The hearing officer, in the Background Information section, recites "[Ms. L] yelled, 'Stop!' A cashier also yelled, 'Stop!'" What Ms. L at one point testified was:

> [The boys] came running up, [the claimant] right behind them. Our paths crossed. And, you know, I was surprised and shocked. And I was telling everyone to stop. I wanted everybody running to just stop running and listen to what I had to say. And, of course, I was ignored and the pursuit continued. (TR pages 40, 41.)

The claimant testified that he thought Ms. L was yelling at the boys to stop, not him. Regarding what the cashier said, Ms. L testified:

> Yes. There was a cashier on duty. Her name is [S]. She had said that she saw him running out of the door, and she tried to voice to them to stop, that it was a bad idea. (TR page 46.)

In a statement S stated "I tried to get his attention, I asked what he was doing and told him to stop, he ignored me." The claimant testified that he "was going to stop

them and ask them if they would give the stuff back. . . ." (TR page 15.) The claimant followed the boys out of the store and presumably, into the parking lot when he tripped sustaining some injuries.

In evidence is an orientation pamphlet, signed by the claimant regarding loss prevention and safety. A portion of that document states:

> IMPORTANT: ONLY MANAGEMENT CAN APPREHEND A SHOPLIFTER! It is your job to help deter and prevent shoplifting, but **only members of management can apprehend someone for shoplifting**. If you see something suspicious, follow the prevention tips listed above and notify your manager immediately. (Emphasis in the original.)

The hearing officer, in the discussion portion of his decision cites the definition of injury in Section 401.011(10) and course and scope in Section 401.011(12). The hearing officer also notes:

> Just because an employee deviates from his employment in a minor manner does not automatically take the case out of the course and scope of employment. Texas General Indemnity Co. v. Luce, 491, S.W.2d 767 (Tex. Civ. App.-Beaumont 1973, writ ref'd n.r.e.). The general rules is that a violation of instructions of an employer by an employee will not destroy the right to compensation, if the instructions relate merely to the manner of doing work, as opposed to a rule intended to limit the scope of employment. Brown v. Forum Ins. Co., 507 S.W.2d 576 (Tex. App-Dallas 1974, no writ). *See also* Maryland Casualty Company v. Brown, 115 S.W.2d 394 (Tex. 1938).

The Appeals Panel has frequently cited the Brown cases, *supra,* as well as Westchester Fire Insurance Co. v. Wendeborn, 559 S.W.2d 108 (Tex. Civ. App.-Eastland 1977, writ ref'd n.r.e) for the proposition that violation of an employer's policy or instructions will not, as a general rule, remove the worker from the right to compensation where the rule relates to the manner of doing work, as opposed to a rule intended to limit the scope of employment. *See also* Texas Workers' Compensation Commission Appeal No. 010058, decided February 13, 2001, and Texas Workers' Compensation Commission Appeal No. 982347, decided November 16, 1998. The distinction between the method or manner of performing a task and the ultimate "thing" or scope can be very tricky and "sophistry has had very little success." Larson's Workers' Compensation Law § 31.21.

In the present case it is undisputed that the claimant was assigned the task of "over servicing" the boys or to provide "over-assertive guest services." The claimant testified (as recited by the hearing officer) that Ms. L told him and a coworker "not to let the shoplifters leave the store." Ms. L agrees that she told the claimant to follow the boys. (TR page 49.) Although the claimant left the store he apparently remained on the immediate premises of the parking lot. Consequently, it was the claimant's job (in this

instance) to over-service the boys, keep them in sight and maybe not let them leave the store. It would appear that following the boys outside into the parking lot was more of a form of method of performing his duties of over servicing, following and keeping the boys in sight, rather than the limiting scope of apprehending a shoplifter, an act which was reserved to senior management.

The hearing officer cites Texas Workers' Compensation Commission Appeal No. 011700, decided September 5, 2001, as being very closely in point. In Appeal No. 011700, the worker was a security guard posted at a construction site to secure the premises. Because there was no guard shack the worker used his vehicle as his post. He had written instructions what to do in various emergencies and that his "only responsibility is for the property being secured; and that a security guard is not supposed to leave the post and doing so is serious misconduct." The worker apparently saw some men "run towards a wooded area;" got out of his truck (thereby abandoning his post) and "started across the service road towards the scene of the [motor vehicle accident] MVA and was struck by a pickup truck." The hearing officer, in that case, in holding against the worker "considered the distance of the decedent's [worker] accident from the security site as well as the evidence that the three men were running away from the MVA and that the security guards were instructed to remain on post and call 911." We find Appeal No. 011700 clearly distinguishable from the facts of the instant case.

We hold that the hearing officer erred in finding that when the claimant "chased the shoplifters out of the store, he took himself out of the course and scope of his employment" under the particular facts of this case where the claimant was instructed to keep the boys in sight. Moreover in light of the Texas Supreme Court's affirmation of the doctrine of liberal construction of the 1989 Act in Albertson's Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999), a determination that the policy violation, if any, was of such a magnitude to remove the claimant from the course and scope of employment is not compelled in this case. Accordingly, we reverse the hearing officer's determination that the claimant did not sustain a compensable injury while in the course and scope of his employment and render a new decision that the claimant did sustain a compensable injury while in the course and scope of his employment.

The hearing officer also found that because of the claimed injury the claimant was unable to obtain and retain employment at wages equivalent to the preinjury wage (*see* Section 401.011(16) for the definition of disability) from January 24 through February 25, 2005, and at no other times (to the date of the CCH). The claimant appeals the determination that he did not have disability (because the injury was not sustained in the course and scope of employment) contending that he had disability to May 12, 2005. There was conflicting evidence about the length of disability and the hearing officer, as the sole judge of the weight and credibility to be given to the evidence, including medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)) determined that the inability to obtain and retain employment at the preinjury wage ended on February 25, 2005. That determination is supported by Carrier's Exhibit E page 10 and

Claimant's Exhibit No. 5. We reverse the hearing officer's determination that the claimant did not have disability and render a new decision that the claimant had disability from January 24 through February 25, 2005, and at no other dates prior to the CCH.

The true corporate name of the insurance carrier is **TRAVELERS PROPERTY & CASUALTY COMPANY OF AMERICA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY DBA
CSC – LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge