APPEAL NO. 081524
FILED DECEMBER 18, 2008

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 September 10, 2008. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, because it did not arise out of and in the course and scope of his employment and that since the claimant did not sustain a compensable injury the claimant did not have disability.

The claimant appealed, contending that he was in the course and scope of employment and had disability. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and a new decision rendered.

FACTUAL SUMMARY

The facts are largely undisputed. The claimant was a security guard and worked a shift from 10:00 p.m. to 6:00 a.m. Around 5:30 a.m. on _____, the claimant was making a last minute check of a building at the back of the grounds. In order to do this quickly, contrary to the employer's policy, he drove his personal vehicle to the building. On arriving at the building the claimant got out of his car, leaving the engine running and the transmission in "park." When the claimant came out of the building he noticed his car was rolling into a ditch. The claimant ran to the car, and in an attempt to stop the car he injured his left foot when his foot was caught between the car and a post. There was testimony that the claimant's car had pre-existing transmission problems which caused it to sometimes slip out of gear. The employer had a policy which prohibited security guards from using a car to perform their security patrol on the premises.

COURSE AND SCOPE

Violation of Policy

The Appeals Panel has cited Maryland Casualty Co. v. Brown, 115 S.W.2d 394 (Tex. 1938) and 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 or policy relates to the manner of doing work, as opposed to a rule or policy intended to limit the scope of employment. Appeals Panel Decision (APD) 080320-s, decided April 24, 2008. *See also* APD 010058, decided February 13, 2001, where the Appeals Panel affirmed the hearing officer's decision that the violation of a company policy where an employee drove his own car (as opposed to

the company car) to a school's bus barn was a violation of a policy regarding the method in which the employee's employment was to be accomplished, not the scope of the employment, and was not a deviation from the course and scope of his employment. Similarly, in the present case, we hold that the claimant's violation of the policy which prohibited security guards from using a car to perform their security patrol was a violation of a policy regarding the method in which the claimant's employment was to be accomplished, rather than limiting the scope of employment.

Deviation

The hearing officer, in her Background Information discussion, commented:

> The violation of this rule/policy [prohibiting security guards from using a vehicle], however, would not defeat the [c]laimant's right to compensation as long as he was furthering the employer's business or affairs at the time of the injury. The question, then, is whether he was furthering the employer's business or affairs when he was trying to prevent his car from rolling into the ditch, which occurred after he left the last building after doing his security tasks. After a review of the entire record, it is determined that the [c]laimant was not furthering the employer's business or affairs at the time his injury occurred. His tasks were done at that point, and he had deviated from his employment at that specific point in time.

The carrier contends that the claimant had deviated from his employment and was not furthering the affairs of the employer when he was trying to get his vehicle out of the ditch. Section 401.011(12) provides in pertinent part that "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, and that the term includes an activity conducted on the premises of the employer or at other locations. The hearing officer found that although the claimant sustained harm to his left foot on _____, the injury did not occur while the claimant was engaged in an activity that originated in and had to do with the employer's business and that was performed by him in furtherance of the business or affairs of the employer. We disagree.

The claimant's duties were that of a security guard. The claimant was making his rounds and securing the buildings and his action in attempting to stop a car from rolling in the ditch was in the course and scope of employment. The fact that the vehicle was his own car did not remove him from the course and scope of employment. If the claimant had seen an unauthorized vehicle rolling into a ditch on the employer's premises he would have been in the course and scope of his employment by furthering the affairs or business of the employer in trying to stop the car before it did damage to the employer's premises.

In Texas General Indemnity Company v. Luce, 491 S.W.2d 767, 768 (Tex. Civ. App.-Beaumont, 1973, writ ref'd n.r.e.), the court of appeals affirmed workers' compensation coverage for an employee who had gone to pick up her paycheck as required by her employer while she was on vacation, then went behind the serving line to speak with her fellow employees and was injured. The court of appeals held that "[t]he law must be reasonable. . . . We are unable to apply the principle of deviation from employment so rigidly as to ignore the common habits of most people."

In APD 001700, decided September 8, 2000, an employee twisted her knee going down a staircase on the employer's premises while on her way to see if she would need help starting her car when she left for the day. The Appeals Panel, in APD 001700, held that an act which is reasonably anticipated to be performed by an employee, performed while on the premises, and which does not deviate from the course and scope of employment to the extent that an intent to abandon employment can be inferred, remains within the course and scope of employment.

APD 012541, decided November 19, 2001, is a case where an employee twisted her knee when she stepped into a hole in the parking lot of the employer's premises, where she had gone to notify her husband, who was waiting to pick her up, that she had not yet finished her work. The Appeals Panel, in that case, affirmed the hearing officer's decision that the claimant sustained a compensable injury and cited APD 001700, *supra*, and the Luce, *supra*, case. As previously noted, APD 001700, held that an act which is reasonably anticipated to be performed by an employee, performed on the premises, and which does not deviate from the course and scope of employment to the extent that an intent to abandon the employment can be inferred, remains within the course and scope of employment.

We hold that the claimant in the present case, if he deviated from the course and scope of employment at all, did not do so to the extent that an intent to abandon the employment can be inferred. Accordingly, we reverse the hearing officer's decision that the claimant's left foot injury is not compensable since it did not arise out of and in the course and scope of his employment and we render a new decision that the claimant sustained a compensable injury on _____.

DISABILITY

The hearing officer's determination that the claimant did not have disability is premised on the determination that the claimant had not sustained a compensable injury. The hearing officer did make a finding that the claimant was unable to obtain and retain employment at wages equivalent to his pre-injury wage as a result of his _____, left foot injury, from September 13, 2007, through February 24, 2008 (*See* Section 401.011(16)). That finding is supported by the evidence. In that we have reversed the hearing officer's determination that the claimant did not sustain a compensable injury because he was not in the course and scope of his employment and rendered a new decision that the claimant had sustained a compensable injury, we also reverse the hearing officer's determination that the claimant did not have disability.

We render a new decision that the claimant had disability, as that term is defined in Section 401.011(16), from September 13, 2007, through February 24, 2008, based on the hearing officer's factual finding regarding the claimant's inability to obtain and retain employment at the pre-injury wage.

SUMMARY

We reverse the hearing officer's determination that the claimant did not sustain a compensable injury because he was not in the course and scope of his employment and we render a new decision that the claimant sustained a compensable injury on _____. We also reverse the hearing officer's determination that the claimant did not have disability as defined in Section 401.011(16). We render a new decision that the claimant had disability from September 13, 2007, through February 24, 2008, based on the hearing officer's factual finding regarding the claimant's inability to obtain and retain employment at his pre-injury wage.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge