APPEAL NO. 090873
FILED AUGUST 20, 2009

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 May 4, 2009. The hearing officer determined that the appellant (claimant) did not sustain an injury in the course and scope of her employment on _____, and that the claimant did not have disability.

The claimant appealed, contending that she was on a break when she was on her way to the parking lot to retrieve a postage claim form and therefore she was in the course and scope of employment and had disability. Respondent 1 (self-insured) responded, contending in particular that the claimant had deviated from the course and scope of her employment. The appeal file does not contain an appeal or response from respondent 2 (subclaimant).

DECISION

Reversed and rendered.

The claimant was a supervisor in one of the self-insured's departments. The hearing officer, in the Background Information, commented that "[e]ssentially, there was no dispute that an incident occurred on _____ and that the [c]laimant was injured as a result thereof." The claimant had testified that she took a break at 1:30 p.m. to go back to her personal vehicle to retrieve a postage claim form for her daughter. The claimant testified that she was walking toward her vehicle when she tripped and fell, injuring her right upper extremity and left elbow. The hearing officer found that the claimant was not in the course and scope of her employment at the time of her injury.

COURSE AND SCOPE OF EMPLOYMENT

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 self-insured argued that the claimant had deviated from her duties by leaving the building to retrieve a form having nothing to do with the self-insured's business, citing Lesco Transportation Co., Inc. v. Campbell, 500 S.W.2d 238 (Tex. Civ. App.-Texarkana 1973, no writ). Lesco, stated the general proposition as follows:

> Stated in converse terms, the rule is that when an employee abandons and turns aside from the course and scope of his employment, such

> deviation defeats a claim for compensation. Such deviation occurs if at the time of injury the employee is engaged in and pursuing personal work or objectives that do not further the employer's interest. An injury received under such circumstances is not from a hazard that has to do with and originates in the employer's business, work, trade or profession. [Citation omitted.]

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 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 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 Appeals Panel Decision (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. In that case, the Appeals Panel 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. The Appeals Panel further noted that the similar factual situations involving brief deviation in APD 971607, decided September 30, 1997, and APD 992215, decided November 8, 1999 (cited by the self-insured in the present case and which were held not to be in the course and scope of employment), would no longer be followed and held that to the extent those cases conflicted with APD 001700, those cases were overruled.

In APD 012541, decided November 19, 2001, 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 the previously discussed APD 001700, *supra*, and Luce, *supra*.

The self-insured cites several cases where an intent to abandon the employment could be inferred. In Ranger Insurance Company v. Valerio, 553 S.W.2d 682 (Tex. Civ. App.-El Paso 1977, no writ), the court noted that the deviation that was compensable in Luce, *supra,* was "slight" and found that injury to an employee who sought to extricate a rabbit from a pipe was not one which occurred in the course and scope of employment even though the employee was on the clock when it happened. The self-insured also cited Roberts v. Texas Employers' Insurance Association, 461 S.W.2d 429 (Tex. Civ. App.-Waco 1970, writ ref'd). In Roberts, the court held that the employee did not sustain an injury in the course of her employment when, before punching the time clock, she took a box for her own personal use from her place of employment to her car which

was parked on the employer's parking lot. Employee's activities in APD 041381, decided July 30, 2004 (checking a son's car, which was having mechanical problems) was also found not to be in the course and scope of employment. In APD 010163-s, decided March 5, 2001, the employee had purchased 25 bags of concrete from the employer and was injured as he loaded a bag onto his truck. In that case the Appeals Panel reversed and rendered a new decision that the claimant did not sustain a compensable injury. The Appeals Panel noted that the Texas courts have held there are minimal "deviations" of short duration in the nature of common human habits that do not constitute a departure from the course and scope of employment, but that acting in the capacity of customer of one's employer is not one of these minimal deviations that is considered to be within the course and scope of employment.

In the instant case, the evidence established that the claimant was injured in the course and scope of her employment and that she did not deviate from her duties to the extent that an intent to abandon the employment can be inferred. We hold that the hearing officer's determination that the claimant did not sustain an injury in the course and scope of employment to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Accordingly, we reverse the hearing officer's decision that the claimant did not sustain an injury in the course and scope of her employment on _____, and we render a new decision that the claimant sustained an injury in the course and scope of her employment 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 an injury in the course and scope of her employment. The hearing officer did make a finding that beginning on _____, and continuing through November 16, 2008, and from November 21, 2008, and continuing through January 11, 2009, the claimed injury was a cause of the claimant's inability to obtain and retain employment at wages equivalent to her pre-injury wage. (*See* Section 401.011(16)). That finding is supported by sufficient evidence. In that we have reversed the hearing officer's determination that the claimant did not sustain an injury in the course and scope of her employment and rendered a new decision that the claimant had sustained an injury in the course and scope of her employment, we also reverse the hearing officer's determination that the claimant did not have disability as a result of a compensable injury. We render a new decision that the claimant had disability, as that term is defined in Section 401.011(16) from _____, through November 16, 2008, and from November 21, 2008, through January 11, 2009, based on the hearing officer's factual finding regarding the claimant's inability to obtain and retain employment at her pre-injury wage.

SUMMARY

We reverse the hearing officer's determination that the claimant did not sustain an injury in the course and scope of her employment and we render a new decision that the claimant did sustain an injury in the course and scope of her employment 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 _____, through November 16, 2008, and from November 21, 2008, through January 11, 2009.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

JD
COUNTY JUDGE
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge