

APPEAL NO. 110263
FILED MAY 2, 2011

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 January 26, 2011. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on _____, and that the claimant had disability as a result of the injury from August 24, 2010, to the CCH. The appellant (carrier) appealed, contending that the hearing officer's determinations of compensability and disability are in error because the claimant deviated from the course and scope of his employment. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

It was undisputed that the claimant was a truck driver for the employer and that he sustained damage or harm to the physical structure of his body in a motor vehicle accident (MVA) on _____. At issue was whether the claimant was in the course and scope of his employment at the time of the MVA. The claimant testified that he was instructed during the afternoon of _____, to deliver brine water to a specific location. At approximately 4:00 pm he had returned to the brine station to fill up so he could deliver another load, but when he arrived two other trucks were in front of him to get loaded. The claimant testified that he had not yet had a lunch break that day and that he decided to travel to his home which was less than 4 miles away and get lunch. It was undisputed that the route he drove to his home was not on the route he would have driven to either pick up a load of brine water or deliver the water once it was loaded to the drill site. On the way to his house, the claimant was involved in a MVA in which he sustained injuries.

COMPENSABILITY

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.

In Yeldell v. Holiday Hills Ret. and Nursing Ctr., Inc., 701 S.W.2d 243, 245 (Tex. 1985), the Supreme Court of Texas described the "personal comfort" doctrine in the following terms:

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 might 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 Appeals Panel has held that the personal comfort doctrine does not extend to bring an off-premises injury that occurs during a lunch break within the course and scope of the injured worker's employment. Appeals Panel Decision (APD) 000865, decided June 7, 2000. See also APD 090554, decided June 15, 2009.

A deviation occurs when an employee abandons and turns aside from the course and scope of his employment and is engaged in and pursuing personal work or objectives that do not further the employer's interest, at the time of the injury. See Lesco Transportation Company, Inc. v. Campbell, 500 S.W.2d 238 (Tex. Civ. App.—Texarkana 1973, no writ). See also APD 031309, decided June 30, 2003.

In reviewing a "great weight" challenge, we must examine the entire record to determine if: (1) there is only "slight" evidence to support the finding; (2) the finding is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust; or (3) the great weight and preponderance of the evidence supports its nonexistence. See Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Both the claimant and other representatives from the employer testified that the employer did not have a written policy about when or where the employees were to have a lunch break. The health, environment, and safety officer testified that the employees are encouraged to bring a lunch but were allowed to stop and pick up a lunch if it was on their route. In the instant case, the evidence reflects the claimant drove home, which was outside the route to either pick up or deliver the brine water, for the purpose of eating lunch. Under the facts of this case, the claimant did not sustain a compensable injury under the personal comfort doctrine but rather the claimant deviated from the course and scope of employment when he left the area to pick up the brine water to go to his home which was undisputed to be outside his route.

Accordingly, the hearing officer's determination that the claimant sustained an injury in the course and scope of his employment on _____, is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. We reverse the hearing officer's determination that the claimant sustained a compensable injury on _____, and we render a new decision that the claimant did not sustain an injury in the course and scope of his employment on _____.

DISABILITY

Section 401.011(16) defines disability as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." Without a compensable injury the claimant would not have disability as defined by

Section 401.011(16). APD 060779, decided June 19, 2006. We reverse the hearing officer's determination that the claimant had disability as a result of the injury from August 24, 2010, to the CCH and render a new decision that the claimant did not have disability because he did not sustain a compensable injury.

SUMMARY

We reverse the hearing officer's determination that the claimant sustained a compensable injury on _____, and we render a new decision that the claimant did not sustain an injury in the course and scope of his employment on _____.

We reverse the hearing officer's determination that the claimant had disability as a result of the injury from August 24, 2010, to the CCH and render a new decision that the claimant did not have disability because he did not sustain a compensable injury.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**MR. RON O. WRIGHT, PRESIDENT
6210 EAST HIGHWAY 290
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Thomas A. Knapp
Appeals Judge