APPEAL NO. 93013

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). The employer/carrier is a self-insured political subdivision under Article 8309h.

On December 3, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine whether the claimant, was injured in the course and scope of his employment, or during a deviation from employment, on (date of injury), while employed as a swim instructor by the (carrier).

The hearing officer determined that the claimant was so injured, and was not engaged in horseplay at the time of his accident, or otherwise outside the course and scope of his employment. The hearing officer further ordered payment of temporary income benefits.

The carrier has filed an appeal contending that the claimant was engaged in horseplay at the time of his accident, and that even if the free swim time granted to the staff was a permitted activity, the claimant's violation of an express rule and order not to dive into the shallow end of the pool was a deviation from the course and scope of employment. The claimant responds that the questions relating to course and scope were determinations of fact, and that the evidence supports the decision of the hearing officer.

DECISION

Finding the decision of the hearing officer to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, we reverse and render a new decision.

The claimant was 18 years old, and a high school graduate, at the time of his accident on (date of injury). He was employed as a swimming instructor part-time during summer of 1992 at the (employer), for the (city). In high school, the claimant had been on the swimming team, and as part of his skills for competitive swimming learned how to dive into shallow water.

The claimant taught swimming classes in the morning. These classes were over around noon each day, and, prior to opening the park for public swimming, pool employees and volunteers were allowed a free swimming time for around 15-30 minutes. Prior to opening the pool to the public, a rope had to be attached to divide the shallow from the deep ends of the pool. The claimant was not a lifeguard and did not work during the public hours. The claimant testified (and his witness agreed) that he had dived into the shallow area of the pool on numerous occasions.

The claimant's memory of the events of the day are not complete. He remembered diving, banging his head on the bottom of the pool, and being unable to move. The

testimony of other witnesses who were present (and who at the time of the hearing were recent or current high school students) indicated the following facts. The day was the birthday of lifeguard Mr Z. After the class, claimant and a volunteer instructor, Ms H, carried Mr. Z to the deep end of the pool and threw him in. Mr. Z proceeded to swim to the shallow end of the pool while Mr. H and claimant walked toward that end. When they reached the shallow, three foot deep end, Mr. H dove in. At that point, Ms. C, a lifeguard and pool manager, yelled to Mr. H and claimant not to dive in the three foot end. Claimant responded, "Oh no?" (described by Mr. Z "like, oh no, I'll do it anyway") and dove in. Mr. heard claimant hit the bottom of the pool (he said he was six feet away from claimant), went over to claimant, and saw that he was not moving. He turned him over and saw that he was bleeding from the mouth. The claimant was held stationary in the water until the ambulance arrived because there was no back board.

Everyone agreed that the swim instructors and lifeguards were allowed to swim each day before clocking out. Those who worked in the afternoon stayed. While swimming was not required, it was not prevented. Mr. Z testified that he had dived into the shallow end. The shallow end of the pool was prominently marked "No Diving."
Ms. C testified that, regardless of a person's experience, diving into the shallow end was never permissible for either a member of the public or staff. She stated that she had never seen the claimant dive into the shallow end before.

The extent of the injury was described by claimant's attorney in her opening statement as a spinal cord injury causing paralysis from the neck down, although she stated claimant had regained some limited use of his hands. The carrier's attorney in opening statement indicated that the extent of injuries, which had greatly impacted his life, was not disputed but that the connection to work was. No one, however, directly testified as to the present extent of the injuries. The claimant was allowed to testify from where he sat. The carrier's notice of disputed claim (TWCC-21) describes the injury as "head/ neck/paralysis" but does not specifically indicate the type of benefit in dispute.

The 1989 Act at Article 8308-3.02 specifically provides that:

An insurance carrier is not liable for compensation if:

(3)the employee's horseplay was a producing cause of the injury;

Texas case law prior to the enactment of the 1989 Workers' Compensation Act developed the concept that horseplay by the employee himself (as opposed to being injured as the result of someone else's horseplay) results in a denial of compensation. *See generally* Cassell v. United States Fidelity Company, 283 S.W.127 (Tex. 1926); Texas Employers Insurance Association v. Brogdon, 321 S.W.2d 323 (Tex. Civ. App.-Fort Worth 1959, writ ref'd n.r.e.); United General Insurance Exchange v. Brown, 628 S.W.2d 505 (Tex.

App.-Amarillo 1982, no writ). We have addressed the issue of horseplay in several previous decisions. In Texas Workers' Compensation Commission Appeal No. 91029, decided October 25, 1991, we upheld the denial of benefits where horseplay involving a stunt gun ended up in a gunshot injury. In Texas Workers' Compensation Commission Appeal No. 92072, decided April 9, 1992, we upheld the hearing officer in awarding benefits in a situation involving a wrist injury where the evidence was in conflict as to whether claimant's injury was a result of horseplay by striking items in a "karate chop" as opposed to sustaining an injury loading 60 pound boxes. In Texas Workers' Compensation Commission Appeal No. 92536, decided November 16, 1992, benefits were upheld where the evidence supported, and the hearing officer found, that the claimant was a victim of someone else's horseplay and was not a voluntary participant in the horseplay.

Clearly, all the cases teach that the question of whether or not there is a deviation from the course and scope of employment as a result of horseplay resulting in the denial of benefits, is generally a question of fact for the trier of fact. An exception exists where the proof is such that reasonable minds can draw only one conclusion from the evidence, that is, that the claimant willingly engaged in an act of horseplay and that such act of horseplay resulted in injury. Brown, *supra*. That is, in the majority opinion, the situation in this case. We could hardly craft a more classic situation of horseplay than that which led to the tragic injury in this case. Unlike the factual setting in the Brown case where there was evidence of a hiatus in the horseplay, and that it had stopped and the parties had calmed down before the injury, we cannot find a scintilla of evidence here to support any breaking in the chain of horseplay events right up to the point of injury. The evidence is so overwhelming that what occurred was an instance of swimming pool horseplay starting with the carrying of a lifeguard to the deep end of the pool, throwing him in, proceeding to the shallow end of the pool as the lifeguard proceeded to swim to the shallow end, and then diving into the shallow end close to the lifeguard in spite of specific instructions not to do so, culminating in claimant's hitting the bottom of the pool and sustaining serious injury.

The hearing officer found that the claimant was not engaged in horseplay at the time of his injury on (date of injury) and concluded his injury was compensable. We have consistently held that there is no sound basis to reverse or otherwise disturb a hearing officer's determination unless the great weight and preponderance of the evidence is so against the determination as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. The case before us presents, in the opinion of the majority, such a situation. Without question, this case is a tragic situation and while great concern and sympathy for this young man are compelling, we cannot ignore the clear mandate of the legislature in enacting Article 8308-3.02 or overlook our responsibilities in reviewing the evidence to ensure the application of the appropriate and proper standard of evidentiary sufficiency, as we understand them to be, as best we can. In our opinion, the great weight and preponderance of the evidence supports only a conclusion that the claimant's horseplay was a direct, producing cause of the injury

he sustained on (date of injury).

Further, the majority view the claimant's conduct in diving into the shallow end of the swimming pool, under the circumstances of this case, as misconduct, apart from the statutory exceptions in Article 8308-3.02, sufficient to remove claimant from the course and scope of his employment. The general statement of the principle is stated in 1A Larson's Workmen's Compensation Law § 31.00 (1992) as follows:

> When misconduct involves a prohibited overstepping of the boundaries defining the *ultimate work* to be done by the claimant, the prohibited act is outside the course of employment. But when misconduct involves a violation of regulations or prohibitions relating to *method* of accomplishing that ultimate work, the act remains within the course of employment. Violations of express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished from activities contributing directly to the accomplishment of the main job, are an interruption of the course of employment.

This principle has been recognized by the Texas Supreme Court. *See* Maryland Casualty Co. v. Brown, 115 S.W.2d 394, 397 (Tex. 1938). Professor Larson cites cases from other states to exemplify the application of this principle. For example, the Wisconsin Supreme Court observed in Sheboygan Airways, Inc. v. Industrial Comm'n, 209 Wisc. 352, 245 N.W.178 (1932), that if a pilot, while giving a lesson, engaged in aerobatics and buzzed the student's property solely for the thrill of it, he would be outside the scope of employment. The Wisconsin Court distinguished such activity from the mere violation of a rule limiting the pilot's permissible attitude, the violation of which would be an infraction as to the method of performing the work. Notes Professor Larson, "[o]ne gets the impression that although the dive here was a violation of rules, this would have been a departure from the employment even apart from the violation."

In the case under consideration, the scenario is analogous. Claimant was employed as an instructor of swimming whose instruction, presumably, included warnings against diving into the shallow end of the pool. The pool was marked "no diving" in the shallow end. The pool manager admonished claimant not to perform the dive. Under these circumstances, we view claimant's conduct as the violation of a workplace rule such as to have removed him from the course and scope of his employment and not the mere violation of a workplace rule pertaining to the method by which he was to perform his work. Accordingly, for this reason, the hearing officer's finding that the violation of the rule against diving in the shallow end did not constitute a deviation from the course and scope of claimant's employment is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

For the above reasons, the decision of the hearing officer is reversed and a new decision rendered that the claimant's injury was not sustained in the course and scope of his employment.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

DISSENTING OPINION:

I respectfully dissent, and would affirm the hearing officer in this case because I believe that the determinations made by the hearing officer are determinations of fact, and are supported by sufficient evidence and has support in case law.

It is important to emphasize that a carrier is liable for injuries occurring within the course and scope of employment without regard to fault or negligence on the part of the injured employee. 1989 Act, Article 8308-3.01(a). Therefore, it is clear that negligent actions that take place while a person is otherwise engaged in the course and scope of employment, including permitted recreational activities on the employer's premises, cannot themselves be isolated and contained as outside the scope of employment. Contrary to the carrier's point on appeal that the 1989 Act has changed old law through the codified definition of course and scope, Article 8308-3.01(a)(1) makes clear that the carrier is still liable for an "injury" that arises out of the course and scope of employment. The case law developed under the compensation laws in effect before the 1989 Act are still instructive for analyzing whether the claimant was within the course and scope of employment when he was injured.

Whether an activity arises out of and originates with employment is a fact question. Fidelity & Guaranty Insurance Underwriters Inc. v. La Rochelle, 587 S.W.2d 493 (Tex. Civ. App.-Dallas 1979, writ dism'd); Gulf Insurance Company v. Johnson, 616 S.W.2d 320 (Tex. App.-Houston [1st Dist.] 1981, writ dism'd agmt). The hearing officer here determined that the free swim time was within the course and scope of employment, a decision supported

by the record.

Carrier primarily argues that because claimant's negligent conduct that caused his injury was not authorized and in fact specifically prohibited, that his claim fails even if the free swimming time is viewed as a permitted activity by the employer. The carrier further argues that the disobedience was done in the spirit of horseplay.

However, whether or not an employee was a participant in horseplay at time of injury is a question for the trier of fact. United General Insurance Exchange v. Brown, 628 S.W.2d 505 (Tex App.-Amarillo 1982, no writ). It is up to the hearing officer to determine whether horseplay that may have preceded an injury was in fact over by the time the injury took place. While there is evidence on either side of the issue in this case, the hearing officer's finding that the horseplay exception does not apply is supported by the evidence. After Mr. Z was thrown into the pool, the claimant and his friend walked back toward the shallow end (according to Mr. Z and Ms. L). No one testified that there was continuing playful behavior (although not everyone was asked). Ms. L testified that she did not believe that the dive was made as horseplay. I think that the hearing officer's conclusion that the injury did not occur within the ambit of horseplay has support in the evidence, and I cannot agree that the great weight of evidence points inexorably to an unbroken course of horseplay, any more than it did in the Brown case cited above.

The fact that the claimant violated a rule or express direction at the time of injury is the harder issue in this case. Nevertheless, a violation of a rule or policy that leads to an injury does not, as a matter of law, establish the injury as one occurring during a deviation from employment. Westchester Fire Insurance Co. v. Wendeborn, 559 S.W.2d 108 (Tex. Civ. App.-Eastland 1977, writ ref'd n.r.e.). As stated in Maryland Casualty Co. v. Brown, 115 S. W. 2d 394 (Tex. 1938):

"While it seems to be the rule 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, yet it seems to be held by the weight of authority that violation of instructions which are intended merely to limit the scope of employment will prevent a recovery of compensation . . ."

In this case, the hearing officer apparently concluded that the instruction not to dive in the shallow end did not limit the scope of employment, but was a safety instruction controlling the manner of doing work, and therefore determined that a violation of the rule was not a deviation from the course and scope of employment. I would support her decision.

A compensable injury that takes place at the place of the employment, while the employee is required to hold himself in readiness for work, and where the employer impliedly

or expressly gives permission for the activity, is compensable as occurring within the course and scope of employment, even if no specific duty incident to employment is being discharged. Mersch v. Zurich Insurance Company, 781 S.W.2d 447 (Tex. App.-Fort Worth 1989, writ denied). Although the claimant had finished his classes, he stated that the rope would have to be attached before the public was allowed into the pool. There was no testimony that any one person was solely responsible for doing this. There was testimony that employees did not "clock out" until after this period. The employer furnished and supervised the location of the recreation. I think a certain amount of recreational activity from teenage employees is foreseeable and, in this context, the disobedience of the diving rule, although fault or negligence on the part of the claimant, nevertheless does not rise to the level of violation of a limitation on the scope of employment.

There is evidence in this case that goes either way. Nevertheless, the hearing officer is the person who observed the demeanor and testimony of all witnesses in this case, and who is the sole judge of credibility and weight of the evidence. Article 8308-6.34(e). I would affirm her decision in this case.

Susan M. Kelley
Appeals Judge