APPEAL NO. 982250

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 19, 1998, a contested case hearing was held. With respect to the only issue before him, the hearing officer determined that respondent's (claimant) activity at the time of his injury was incidental to his duties and that claimant sustained a compensable ankle injury on _____ (all dates are in 1998).

The State Office of Risk Management, referred to as the self-insured or carrier, appeals, contending that claimant was not in the course and scope of his employment at the time of his injury, that claimant was engaged in "horseplay" and that claimant was not "within the ambit of the personal comfort doctrine." Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the claimant.

DECISION

Affirmed.

The background facts are essentially undisputed. Claimant was a drug abuse counselor for the (employer), an agency represented by of the self-insured. Claimant normally conducted training sessions in a classroom in the prison chapel; however, on the day in question, January 22nd, the location of the training session was changed because the chapel was being used for a religious service and the class was moved to the gymnasium. Claimant was presenting a two-hour class to 37 inmates. The schedule called for a 10-minute break roughly halfway through the session. Claimant was the only staff member watching the inmates and was required to remain in the gym during the break to watch the inmates. During the break, claimant pretended to shoot a jump shot toward one of the basketball goals and, in coming down, he twisted his ankle and fell. Claimant finished his class limping, went home and eventually sought medical care at a hospital emergency room, where it was determined claimant had sustained a broken left ankle. Claimant was able to rearrange his schedule where he missed only two days work.

Carrier's position was that claimant was not in the course and scope of employment, as he was engaging in a voluntary action, and mimicking a jump shot was not part of his duties as a drug counselor. Carrier argued that the personal comfort doctrine did not apply. The hearing officer, obviously doing some independent research as evidenced by his discussion of several Appeals Panel decisions and court cases, concluded by reasoning:

> In this case the Claimant was required to hold his class in the gymnasium. During the break he was required to remain in the gym to observe the inmates. Claimant stated he walked toward one [of] the basketball goals and mimicked a jump shot. Claimant was relaxing during an authorized break in

> the immediate area. This activity, considering his environment, was clearly within the ambit of the personal comfort doctrine. Claimant's case is similar to those considered in Appeals Panel Decisions 941693 [Texas Workers' Compensation Commission Appeal No. 941693, decided January 27, 1995] and 93484 [Texas Workers' Compensation Commission Appeal No. 93484, decided July 30, 1993].

Carrier appealed, contending that claimant was not in the course and scope of his employment and was engaging in "horseplay." First, horseplay is defined in MERIAM WEBSTERS COLLEGIATE DICTIONARY 560 (10TH. ED.) (1993) as "rough or boisterous play." In this case, there is no evidence that claimant's action was rough or boisterous and, obviously, no one else was involved. Claimant merely mimicked a basketball jump shot, came down awkwardly and sustained a broken ankle. We conclude that the hearing officer did not err in failing to apply the horseplay exception.

Whether claimant was in the course and scope of his employment, defined in Section 401.011(12) as 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 is in the furtherance of the affairs and business of the employer, is the question before us. Certainly, claimant's presence in the gymnasium on a break between sessions puts him squarely within the course and scope of his employment as having been directed by the employer. As the hearing officer notes, claimant was required to remain in the gym to watch the inmates. The question then is whether the act of mimicking a jump shot took him out of the course and scope of employment. We think not.

We agree with the hearing officer's analysis and find Appeal No. 93484, *supra*, and Appeal No. 941693, *supra*, controlling. Both those cases found the personal comfort doctrine, as set out in the Texas Supreme Court case of Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985), to be applicable to the employee's taking a break on the employer's premises. In Appeal No. 93484, *supra*, as in this case, the employee, while on a 10-minute break, was tossing a football when he stepped in a hole and sustained an injury. Further, in both instances, the employees were required to hold themselves in readiness for work and the employees were not required or expected to toss a football or, in the instant case, mimic a jump shot. The only distinction between this case and Appeal No. 93484 is the involvement of supervisors in the tossing of the football. Appeal No. 93484 was appealed to the courts and the Corpus Christi Court of Appeals in Texas Workers' Compensation Insurance Fund v. Rodriguez, 953 S.W.2d 765 (Tex. App.-Corpus Christi 1997, pet. granted), affirmed the Appeals Panel which had reversed the hearing officer's finding of non-compensability. The court held:

> Rodriguez was injured at his employer's work place, during his work day, while on a brief regularly scheduled ten-minute break from his usual tasks. The short break he was on originated in the business of his employer and was in furtherance of the employer's business, because to be grinding

> unceasingly at the tasks assigned by his employer without any breaks would be a hazard to himself and others and would not be the most efficient means of conducting his employer's business. While on break, he was in the furtherance of the employer's business. That he was tossing a football or walking across the shop's yard is not material. We hold that he sustained the injury within the course and scope of employment. *See* TEX. LAB. CODE ANN. § 401.011(12) (Vernon 1996).

Different people recreate in different ways while on break. In the instant case, claimant chose to mimic a jump shot rather than toss a football, sit down, drink a glass of water or go to the restroom.

Similarly in Appeal No. 941693, *supra*, the Appeals Panel affirmed the hearing officer who found that claimant's fractured ankle, injured while playing basketball on the employer's premises during a 15-minute break, was a compensable injury. That case discussed Appeal No. 93484, *supra*, several other Appeals Panel decisions and Mersch v. Zurich Insurance Company, 781 S.W.2d 447, 450 (Tex. App.-Fort Worth 1989, writ denied). While we do not believe the Mersch case, as such, is applicable to this situation, it did set out, in the disjunctive, a three-pronged test, whereby an employee in a recreational or social activity sponsored by the employer is in the course and scope of employment if ". . . or (3) where the injury takes place at the place or immediate vicinity of employment while the employee is required to hold him or herself in readiness for work and the activity takes place with the employer's express or implied permission." Appeal No. 941693, *supra.* Appeal No. 941693 goes on to say that as in Appeal No. 93484, *supra*, "it is obviously the third part of the disjunctive three-part Mersch test that could be applicable and we are similarly satisfied here that the evidence establishes the three elements within that third prong or test." However, typically, injuries sustained during short work breaks during working hours on the employer's premises will involve the application of the "personal comfort" doctrine. The Mersch test (and the Section 406.032(1)(D) exception) will typically involve social or recreational activities outside regular work hours.

Carrier contends that the 10-minute break in this case was "intended for those inmates and not for the morale of employees such as Claimant," and that the self-insured "did not institute breaks for the benefit of the employee or the employee morale, but rather for the inmates." We note there was absolutely no evidence that was the case and, in fact, as carrier notes, what policies the self-insured had in this area, if any, were not in evidence. Similarly, there was no evidence that claimant intended, or did, "abandon his job." We rely on the Appeals Panel decision in Appeal No. 93484, as affirmed by the court in Rodriguez, *supra*, that claimant was in the course and scope of his employment under the personal comfort doctrine.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge