APPEAL NO. 010163-S

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 January 2, 2001. The hearing officer held that the respondent (claimant) sustained a compensable injury on _____, while loading sacks into his truck which he had purchased from his employer for his personal use, and that he had disability from September 6 through November 12, 2000.

The appellant (carrier) appeals and argues that the claimant was not within the course and scope of employment when he injured his back but had deviated onto a purely personal enterprise. The carrier disputes the findings and conclusions underlying this decision, and further appeals the finding of disability. The claimant responds that the Appeals Panel has overruled the law upon which the carrier depends for its arguments and that the decision should be affirmed.

DECISION

Reversed and rendered.

Most of the facts were undisputed. The claimant was injured when he was lifting an 80-pound bag of concrete that he agreed he had purchased from his employer for personal use. The employer had a policy that allowed employees to purchase items from its building supply outlet for 10% over cost, and the purchase would be deducted from the employee's paycheck. The claimant was employed as a mechanic, and had a company truck that he would use to go to sites where equipment repair was required.

The claimant said that on _____, while he was on site at the outlet of the employer where he was based, he was injured as he picked up a bag of concrete to load onto a pallet to take out to his truck. Although the extent of this anticipated enterprise is omitted from the hearing officer's recitation of facts, the claimant testified that he had purchased 25 bags, in all, of concrete, and it was his intent at that time to load 12 of these bags onto the pallet and then transport the bags for loading into his truck. He was assisted by another employee whose job it was to load and unload merchandise.

One area of minor dispute was whether the claimant was told that he should make his own purchases after his work shift. Mr. C, the general manager for the outlet where the injury occurred, said that he so instructed the claimant, but the claimant said he was unaware of any such instruction. Mr. C also said that the claimant never unloaded or loaded products. The claimant agreed he was primarily a repairman but estimated that he had helped unload supply trucks four or five times over the course of a year, and may have loaded products for customers another 30 times. This was not his customary job but one he would perform when needed.

The claimant said that he had made personal purchases within the workday before. He described a situation where, while engaged in the repair of equipment, his eyes might become tired and he would take a break to make a purchase.

The claimant said he worked another two weeks after his injury until taken off work by his doctor on September 5, 2000. His employment was terminated the following day. He began working for a higher wage for another employer on November 13, 2000.

We believe that the hearing officer has read too broadly the cited cases Texas Workers' Compensation Commission Appeal No. 001700, decided September 8, 2000, and Texas Workers' Compensation Commission Appeal No. 001821, decided September 19, 2000, as a repudiation of caselaw articulated in McKim v. Commercial Standard Insurance Company, 179 S.W.2d 357 (Tex. Civ. App.-Dallas 1944, writ ref'd) (hereafter referred to as McKim) or in other Appeals Panel cases having to do with injuries during activities that are admittedly undertaken for purely personal reasons. We note that the court in the McKim case found the injury not compensable even as it acknowledged the doctrine of liberal interpretation of the workers' compensation laws.

The decisions in both Appeal Nos. 001700, *supra*, and 001821, *supra*, expressly note that they are not holding that every action undertaken by an employee on the employer's premises, even during approved breaks, will necessarily be within the course and scope of employment. Second, both cases involved brief activities of slight duration which did not involve protracted departure from work responsibilities. Appeal No. 001700, *supra*, had to do with checking on a personal vehicle to see if it would start, and the two cases it expressly overruled were likewise involved with similar facts; Appeal No. 001821, *supra*, involved handing car keys to a co-employee as the worker was headed home from work. Neither case had to do with an injury to an employee while he was acting as a customer of his employer, the situation expressly held in the McKim case to be an activity outside the course and scope of employment.

As noted in Appeal No. 001821, *supra*, the case of Kimbrough v. Indemnity Insurance Company of North America, 168 S.W.2d 708 (Tex. Civ. App.-Galveston 1943, writ ref'd) held that as a general rule "an employee injured while he is engaged in an enterprise of his own and something that is not required in furtherance of his employment is not entitled to workers' compensation." An injury to an employee who was taking a box out to her car during work hours solely for her own personal use was held not compensable in Roberts v. Texas Employers' Insurance Association, 461 S.W.2d 429 (Tex. Civ. App.-Waco 1970, writ ref'd). A similar decision was rendered by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 94089, decided February 14, 1994. The parameters of a compensable deviation are noted in Texas General Indemnity Company v. Luce, 491 S.W.2d 767,768 (Tex. Civ. App.-Beaumont 1973, writ ref'd n.r.e.), wherein a woman was injured while incidently greeting fellow employees on a trip to collect her paycheck; that decision holds that injuries that occur during "common habits of most people" will not constitute a noncompensable deviation from employment.

The extent of permissible deviation that does not remove a worker from course and scope was analyzed in Ranger Insurance Company v. Valerio, 553 S.W.2d 682 (Tex. Civ. App.-El Paso 1977, no writ). This case noted that the deviation that was compensable in the Luce, *supra*, case was "slight." The court in that case 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 claimant was on the clock when it happened. Reading all these cases together, the Texas courts have held there are minimal "deviations" of short duration in the nature of common human habits (much like seeking refreshment or using the telephone at work, which are matters of personal comfort) 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 his decision, the hearing officer applied Appeal No. 001700, *supra*, and found that the claimant did not deviate from his employment to the extent "that an intent to abandon his job to pursue personal matters could be inferred." He also found that, notwithstanding the testimony of the general manager to the contrary, loading the product sacks during the workday "should" have been reasonably anticipated by the employer. We do not, however, agree that whether an employer "should" anticipate deviations from the course and scope absolves the claimant of the burden of proving that such activities were within the course and scope of employment.

No need to "infer" intent was necessary, however, in this case, where it was frankly admitted by the claimant that he was purchasing items for his own use and was injured only during the loading of those items. He further stated that there were times in the past that he would actually leave his repair work in order to take a break and buy items for his use before resuming his work. Finally, the time it would have taken to load 12 sacks onto the pallet, transport them to the truck, and then load them into the truck clearly would constitute a significant, rather than incidental, departure from the claimant's equipment repair duties. As to whether Appeal No. 001700 has utterly changed the course of Appeals Panel decisions in the area of deviation, we are unwilling to read Appeals Panel decisions so broadly so as to reverse applicable caselaw interpreting terms that remained unchanged when the 1989 Act was enacted.

As noted in Texas Workers' Compensation Commission Appeal No. 961848, decided October 30, 1996, which was not overruled by either of the cases cited by the hearing officer and which relies on both the McKim and Kimbrough, *supra*, cases, whether a worker is given permission to perform something personal on work hours is not determinative of whether a claimant was in the course and scope of employment when injured. Likewise, we do not regard the fact that the employer allowed employees to purchase goods at a slight markup to be dispositive of the work-relatedness of a purchasing mission.

Accordingly, we reverse all findings of fact and conclusions of law material to a finding that the claimant sustained a compensable injury, and render a decision that the

claimant was injured when he deviated from the course and scope of his employment to engage in a personal errand, and his injury and resulting period of inability to obtain and retain employment are not compensable.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge