APPEAL NO. 080320-s
FILED APRIL 24, 2008

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 16, 2008, with the record closing on January 28, 2008. The disputed issues were: (1) whether the appellant (claimant) was in the course and scope of her employment when she was involved in a motor vehicle accident (MVA) on _____; (2) whether the claimant sustained a compensable injury on _____; and (3) whether the claimant had disability resulting from a claimed injury, and if so, for what period. The hearing officer determined that: (1) the claimant was not in the course and scope of her employment when she was involved in a MVA on _____; (2) the claimant did not sustain a compensable injury while in the course and scope of her employment with the respondent (self-insured) school district on _____; and (3) because the claimant did not sustain a compensable injury on _____, "no period of disability . . . can be established."

The claimant appealed, contending the violation of the employer's policy did not remove her from the course and scope of employment as the policy related merely to the manner of doing work. The claimant also contended she "incurred a period of disability due to her compensable injury." The self-insured responded, urging affirmance.

DECISION

Reversed and rendered in part and reversed and remanded in part.

It is undisputed that the claimant was a bus driver for the self-insured school district and was involved in a MVA on _____, when, after dropping off all of the students on her afternoon route, she lost control of the bus she was driving and struck a stationary train. There was conflicting evidence regarding whether the claimant was talking on a cell phone at the time of the MVA.

The hearing officer found that on _____, the claimant suffered injuries due to a MVA while talking on a cell phone as she drove a school bus for the self-insured school district; that the self-insured school district had a policy which prohibited the use of cell phones by bus drivers while driving the self-insured's buses; and that the claimant was aware of this policy. Those findings are supported by sufficient evidence.

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 hearing officer and the parties identified and discussed the key question of whether violation of an employer's policy takes an employee out of the course and scope of employment. The hearing officer commented in the Background Information:

> The legal question presented in this case is whether the Claimant's violation of this particular employer policy at the time of her _____ injury took her out of the course and scope of her employment. After a review of pertinent authorities, it is determined that the Claimant's use of a cell phone at the time of her injury on _____, which violated the employer's policy, removed her from the course and scope of her employment. The Claimant's misconduct in using her cell phone while driving a school bus was a "prohibited overstepping of the boundaries defining the ultimate work to be done by [her]." [Appeals Panel Decision (APD) 93013, decided February 16, 1993]. Her conduct in using her cell phone while driving the bus is not viewed as merely violating a workplace rule governing simply the method by which she was to perform her work. For this reason, the Claimant's injury is not compensable and the Self-Insured is not liable for compensation.

Both the hearing officer and the self-insured rely on APD 93013, *supra*.[1] In that case the claimant, a swimming instructor, after swim classes were over, was "allowed a free swimming time." After the class, the claimant and another volunteer instructor, in celebration of a birthday, threw one of the lifeguards in the pool. The lifeguard swam to the shallow end of the pool. The volunteer instructor and the claimant went to the shallow end of the pool and dove into the water, contrary to the express posted policy not to dive into the shallow end. The claimant sustained a serious injury when he hit his head diving into the shallow end of the pool. The majority opinion held that the claimant was not in the course and scope of his employment due to the horseplay exception in Article 8308-3.02 (now in Section 406.032(2)). The majority opinion also went on to find the claimant's conduct in diving into the shallow end of the swimming pool to be "misconduct" sufficient to remove the claimant from the course and scope of his employment. We hold that APD 93013, *supra*, is both factually and legally distinguishable from the case at hand, because at the time of the injury the claimant was not engaged in his main job of teaching a swim class.

[1] In its response, the self-insured refers to "Department of Public Safety Regulation 4.5" which the self-insured states "discusses prohibited practices while driving." The self-insured's Exhibit List identifies its Exhibit K as "4.5 of D.P.S. Regulations;" however, Exhibit K is a one page document that contains no identifying information regarding where it came from and does not mention the Department of Public Safety. Claimant's Exhibit 24 references "Section 4.5 of the Texas Department of Public Safety's Commercial Driver's Manual" which contains the language in Exhibit K. Under the heading of "4.5 PROHIBITED PRACTICES" is a statement "Don't talk with riders, or engage in any other distracting activity, while driving." The exhibit does not specifically address cell phones.

The majority opinion in APD 93013, *supra*, cites Vol. 1A of Larson's Workmen's Compensation Law § 31:00 (1992) entitled Misconduct Apart from Statutory Defenses which states:

> 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.

In Maryland Casualty Co. v. Brown,115 S.W.2d 394 (Tex. 1938), the employee, a car salesman for a Texas car dealership, was injured in Mexico while riding in a car belonging to the employer and he claimed he was in Mexico to solicit business. There was evidence that the employer had instructed the employee not to solicit business in Mexico or to go into that country for the purpose of selling automobiles. In reversing and remanding the judgments of the Court of Civil Appeals and of the district court in favor of the injured employee, the Texas Supreme Court noted that if the employee had been instructed to not solicit business in Mexico, he would have been acting beyond the scope of his employment and stated the following rule:

> 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 to limit the scope of employment will prevent a recovery of compensation.

In Westchester Fire Insurance Co. v. Wendeborn, 559 S.W.2d 108 (Tex. Civ. App.-Eastland 1977, writ ref'd n.r.e.) the court stated that the above quoted language from the Maryland Casualty Co. v. Brown case is the "controlling rule." The Appeals Panel has cited the Maryland Casualty Co. v. Brown and Wendeborn cases for the proposition that violation of an employer's policy or instructions will not, as a general rule, remove the worker from the right to compensation where the rule relates to the manner of doing work, as opposed to a rule intended to limit the scope of employment. APD 051212, decided July 13, 2005; APD 010058, decided February 13, 2001. *See also* Brown v. Forum Insurance Company, 507 S.W.2d 576 (Tex. Civ. App.-Dallas 1974, no writ) a case where the employee was killed while flying a private plane on company business in violation of the employer's rules. The court held that the employee was acting in furtherance of the employer's business and using the aircraft was merely violating a rule regulating the manner and method of performing the work.

Applying the established rule regarding violation of employer instructions to the facts of the instant case, the claimant's main job was to drive the school bus, which was the job for which she was employed, and which she was performing at the time of her injury. The school district's prohibition against using a cell phone while driving the bus was a safety policy in prescribing the manner in which the main job (driving the school bus) was to be performed, and was not a rule limiting the scope of employment. Therefore, the violation of the employer's policy, in this case, would not take the claimant out of the course and scope of her employment.

Accordingly, we reverse the hearing officer's determination that the claimant was not in the course and scope of her employment when she was involved in a MVA on _____, as being contrary to established legal precedent and that the claimant did not sustain a compensable injury while in the course and scope of her employment on _____, as being against the great weight and preponderance of the evidence. We render a new decision that the claimant was in the course and scope of her employment when she was involved in a MVA on _____, and that the claimant sustained a compensable injury on _____.

DISABILITY

The hearing officer determined in Conclusion of Law No. 5 that "Since the Claimant did not sustain a compensable injury on _____, no period of disability, as that term is defined in the Act, can be established." We have reversed the determination of no compensable injury and rendered a decision that the claimant sustained a compensable injury. The hearing officer made the following finding of fact:

> 7. The claimant has **not** been unable to obtain and retain employment at wages equivalent to her wage before _____ from _____ through October 17, 2007 as a result of her _____ injury. She has **not** had any such inability from October 18, 2007 through the present. (Emphasis supplied).

That finding of fact, read literally, indicates that the hearing officer found no period of time the claimant was unable to obtain and retain employment at wages equivalent to her preinjury wage because of her injury of _____. We do not know if there is a typographical error in Finding of Fact No. 7.

The medical evidence indicates that the claimant sustained injuries to include a right proximal one-third humeral fracture, right wrist sprain/strain, right shoulder laceration and contusion, lumbar disc disorder without myelopathy, lumbar radiculopathy involving the right S1 nerve, lumbar sprain/strain, lumbar myospasm, and laceration to the right knee joint. In evidence are Texas Workers' Compensation Work Status Reports (DWC-73) dated from June 18, 2007, through November 16, 2007, taking the claimant off work. A DWC-73 dated June 18, 2007, recites a description of the accident as "MVA while driving school bus" (no date of injury is listed) and the work injury diagnosis information lists a "Rt shoulder dislocation," "Rt shoulder contusion," "L-

spine s/s" and a "Lumbar myospasm." A subsequent DWC-73 dated July 13, 2007, gives a date of injury as _____, with the same work injury diagnosis and takes the claimant off work through "08/13/08 [sic]" pending diagnostic studies. A DWC-73 dated August 22, 2007, takes the claimant off work through September 19, 2007, for "Post Traumatic (FX) in active rehabilitation." The last DWC-73 dated October 17, 2007, references the _____, accident driving a bus, takes the claimant off work through November 16, 2007, for a "post traumatic (FX) in active rehabilitation." The claimant testified that she has not worked or earned any income from May 19, 2007, to the date of the CCH. The claimant contends that she has had disability from _____, that she has problems walking, and that she has not fully recovered from her injuries.

The self-insured's evidence regarding disability is a medical record review by Dr. C, who was asked, among other matters, what medical treatment was recommended and to indicate claimant's "ability to work at this time." Dr. C responded that further treatment is not indicated and sets out some of the disability duration tables of the Medical Disability Advisor, Workplace Guidelines for Disability Duration, excluding all sections and tables relating to rehabilitation published by the Reed Group, Ltd (MDA) for the proximal humerus fracture, minor and major lacerations, and cervical, thoracic and lumbar spine sprains or strains. Dr. C does not provide an opinion regarding duration of disability or how the disability duration tables interact. Dr. C only states "[f]or return to work please [*see*] the tables above." The self-insured, in argument at the CCH, contended that based on Dr. C's report, that were the hearing officer to find a compensable injury, "you are talking 90 days [disability]." That comment is not supported by the evidence.

We reverse and remand this case on the disability issue because we have rendered a decision that the claimant sustained a compensable injury and the great weight and preponderance of the evidence is contrary to the hearing officer's Finding of Fact No. 7 as written. If the hearing officer meant to find, in Finding of Fact No. 7, that the claimant <u>was</u> unable to obtain and retain employment at wages equivalent to her preinjury wage from _____, through October 17, 2007, as a result of her _____, injury, then on remand the hearing officer is to determine an ending date of disability supported by the evidence.

SUMMARY

We reverse the hearing officer's determinations that the claimant was not in the course and scope of her employment when she was involved in a MVA on _____, and that the claimant did not sustain a compensable injury on _____. We render a new decision that the claimant was in the course and scope of her employment when she was involved in a MVA on _____, and that the claimant sustained a compensable injury on _____. We also reverse the hearing officer's decision that the claimant did not have any period of disability as defined in Section 401.011(16) and remand the case back to the hearing officer for a determination of disability that is supported by the evidence.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

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

SUPERINTENDENT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge