APPEAL NO. 93732

At a contested case hearing held in (city, Texas, on July 20, 1993, the hearing officer, (hearing officer), concluded that on (date of injury), the respondent (claimant) sustained a compensable injury and, since May 13, 1993, has had disability under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011 (16). In its request for review the appellant (carrier) asserts the insufficiency of the evidence to support certain of the factual findings as well as these legal conclusions. Claimant's response urges the sufficiency of the evidence and seeks affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

On (date of injury), claimant was employed by (employer). which, according to (Mr. B), the operations manager, made duct sealants and tape and adhesive products. (Mr. T), the plant manager, testified that from time to time ammonia was added to the product being manufactured and the approximately seven employees including claimant were required to leave the room for about 10 minutes to avoid the ammonia vapors. The employees, who were compensated for these "ammonia breaks," could go to the break room which contained tables and chairs, or go out on the concrete dock at the rear of the building. Miscellaneous items were kept on the dock from time to time. Mr. B could not recall what items were stored on the dock on (date of injury) and Mr. T could not be sure whether any chairs were on the dock that day though he said there had been chairs there on occasion.

Claimant testified through a translator that on the morning of (date of injury), she and several coworkers left the room for an ammonia break and went to the dock. She wanted to go out there rather than to the break room for the fresh air. Once on the dock she wanted to sit down but said there was no place to sit down and she did not want to sit on the concrete dock nor on the stairs in the sunlight. So she sat down on the seat of a three-wheeled cycle which Mr. T had brought to the plant in December 1991 to repair. She had seen Mr. T ride the cycle around the plant and had seen many other employees ride the cycle from time to time during their breaks. She did not know why the cycle was at the plant. Mr. T said he brought it to the plant in December 1991 to repair it for sale and also said it was not used in connection with the work. Claimant insisted she did not sit on the cycle to ride it but only to have a place to sit during the ammonia break. Mr. T agreed he had ridden the cycle several times while testing it and that two or three others had also ridden it. He said that the employees had not been told not to ride it, and that it was not used at the plant for any work-related purpose. Mr. B testified that had never seen anyone ride the cycle, that it was not used in the business of the employer, and that employer was not benefitted by claimant's having sat on it.

Claimant, who had not previously been on the cycle, had last ridden a bicycle approximately four to five years earlier. She said that when she sat on the seat she put

one foot on the lower pedal and one foot on the raised pedal and the cycle began to roll. She surmised that the weight of her leg caused the raised pedal to start downwards and the cycle to begin to roll. She said that she knew nothing about the brakes and that next thing she knew the cycle had rolled approximately nine feet and over the edge of the dock. A coworker tried to help her but could not get to her in time. She said she fell about four feet and severely injured her left knee.

At the outset of the hearing, the hearing officer noted from the benefit review conference report that the carrier's position respecting the disputed issue of disability was that claimant had no disability because she did not sustain a compensable injury under the 1989 Act. The carrier indicated it continued to maintain that position and would not be presenting evidence that claimant did not have disability. Claimant testified she had not worked since (date of injury) and cannot do so because her job required a lot of standing. She said her leg hurts and is twisted, that she can not walk straight, that she had an initial operation after the injury, and that she recently had additional surgery. She said her doctor told her she cannot stand or walk for more than two hours at a time. Mr. T agreed that claimant's job required standing, the amount of which varied according to the particular job being performed. Claimant's medical records indicate she had surgery on her knee after the injury, that on October 20, 1992, she was released for sedentary work with the comment that she may not be able to return to standing work on a long-term basis, and that on October 21st she was taken off work pending the obtaining of certain test results. According to the report of a March 22, 1993, examination, claimant was to continue her outpatient home therapy program and return in a month for re-examination. The doctor anticipated she would be able to return to work "in a sitting position" and stated she must avoid positions requiring standing for long periods of time.

The carrier took the position at the hearing, and maintains it on appeal, that it was relieved of liability for this claim on the basis of the horseplay exception to liability in the 1989 Act. Section 406.032(2) provides that an insurance carrier is not liable for compensation if "the employee's horseplay was a producing cause of the injury." The hearing officer found that claimant "sustained a severe left knee injury while on break on a loading dock when she sat on a three-wheeled cycle and inadvertently caused the cycle to roll forward and fall off the loading dock," that "at the time of the injury the Claimant had the implied permission of the Employer to be on the dock and to sit on the vehicle," that "[a]t the time of the injury the Claimant was not engaged in horseplay," and that "[s]ince May 13, 1993 (sic), with the exception of a period of time when she temporarily returned to work for the Employer, the Claimant has been unable to obtain and retain employment at wages equivalent to her pre-injury wages because of her compensable injury." It is apparent that the reference in the latter finding to "1993" was a typographical error. The hearing officer concluded that claimant sustained a compensable injury on (date of injury), and that she has had disability since May 13, 1992, except for the period when she temporarily returned to work.

In Texas Workers' Compensation Commission Appeal No. 93013, decided February 16, 1993, we had occasion to discuss Texas case law and prior Appeals Panel decisions involving the horseplay exception and observed that horseplay need not necessarily involve

activity by persons other than the claimant. We noted that the exception is one of fact for the hearing officer's determination. While specifically disputing the findings that claimant sustained her injury when she sat on the cycle and inadvertently caused it to roll forward and fall off the dock, and that she was not then engaged in horseplay, the carrier does not appear to specifically challenge the finding that at that time claimant had the implied permission of employer to be on the dock and to sit on the cycle. *See* Texas Workers' Compensation Commission Appeal No. 93484, decided July 30, 1993, where we reversed and rendered that an employee tossing a football during a work break was injured in the course and scope of his employment and extensively discussed the "personal comfort" doctrine. We are satisfied these findings are all sufficiently supported by the evidence. There was no evidence that claimant disobeyed any work directive in sitting on the cycle during the ammonia break. Indeed, the evidence was unrefuted that she had seen her supervisor and others actually ride the cycle at the plant from time to time and that the cycle had been on the premises since December 1991.

Claimant had the burden to prove both that she sustained a compensable injury and that she had disability as defined in Section 401.011(16) of the 1989 Act. We have often observed that these issues may be proven by the testimony of the claimant alone. The hearing officer is the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)). The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are some discrepancies. Taylor v. Lewis, 553 S.W. 2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). As the trier of fact, it was for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W. 2d 701 (Tex. Civ. App.-Amarillo 1974, no writ.). We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings' Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge