APPEAL NO. 970370
FILED APRIL 16, 1997

On February 5, 1997, a contested case hearing (CCH) was held in [City], Texas, with [hearing officer] presiding as the hearing officer. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were whether the appellant (claimant) sustained an injury in the course and scope of employment and whether the claimant has had disability. The claimant requests review of the hearing officer's decision that he did not sustain an injury in the course and scope of his employment on [date of injury], and that he has not had disability. The respondent, a self-insured school district (school), requests affirmance.

DECISION

Affirmed.

In [date of injury] the claimant was employed as a maintenance worker at the school, [TK] was the maintenance supervisor, and [RC] was the school principal. In that month, TK bought hay from RC's father and asked several school employees, including the claimant, to go to RC's father's hay field on Thursday, [date of injury], and help him load the hay bales. While helping to load the hay bales at RC's father's field on [date of injury], the claimant injured his left knee when he was run over by the hay trailer. The issue before the hearing officer was whether the claimant's injury was sustained in the course and scope of his employment. It is undisputed that the injury did not occur on the school's premises and that the school's maintenance workers' normal working hours during [date of injury] were from 7:00 a.m. to 5:30 p.m. from Monday through Thursday.

TK testified that the school is not in the hay business, does not sell hay, and does no farming. TK testified that at about 4:30 p.m. on [date of injury] he used RC's van to drive the claimant and two other school maintenance workers, [OB] and [CC], to the field and that it took 30 minutes to an hour to get there. He said that he "wrote out" the claimant, OB, and CC on their time cards. The time cards for the claimant, OB, and CC for [date of injury] reflect that someone manually wrote "4:30" as their "out" time. TK said that he did not instruct the claimant to help him load the hay bales and that he had "asked" and "requested" the claimant to help him with that task in return for a favor he did for the claimant in fixing the claimant's personal air conditioner. TK also said that he did not tell the claimant to "stay on the clock" while helping him load hay bales and that he did not tell the claimant that the school would pay him for that work. TK said that RC and several other school employees, including [TY] and [GS], were at the field when he and the maintenance workers arrived. He said that after the hay was stored at his home, he dropped the claimant off at the school at around 8:00 or 8:30 p.m. He also

said that he paid CC with his own money for helping him and that he paid no one else. He said that he assumed that the claimant knew that he would not be paid for helping him load the hay. In an affidavit, TK stated that the claimant's helping him with the hay was strictly voluntary, that he did not require the claimant to help him, and that the claimant voluntarily left work early to help him. In a recorded statement, TK said that he and the maintenance workers took off work an hour early on [date of injury] and probably arrived at the field about 5:30 p.m.

RC, the principal, testified that her working hours during [date of injury] were from 7:00 a.m. to 3:00 p.m. and that on [date of injury] she left the school about 3:15 p.m. to go to the hay field to help load the hay and that she arrived at the field about 4:00 or 4:15 p.m. She said that TY, the assistant principal, and GS, a teacher who was not working at the school during the summer, drove ahead of her in TK's truck, which pulled a trailer. She said she did not tell anyone who assisted in the loading of the hay that they would be paid by the school for that work and that the school did not receive any benefit from the loading of the hay. She said she thought that TK, the claimant, and the other maintenance workers arrived at the field at about 5:00 or 5:30 p.m. She indicated that the claimant's accident occurred shortly after his arrival at the field. In her recorded statement, RC said that TK did not require that anyone help him and that it was just friends helping friends. She said that she volunteered to help TK.

GS testified that he volunteered to help TK load the hay on [date of injury]; that that activity was not connected with the school in any way; that he and TY went to the school on [date of injury] and waited until RC was off work and then drove to the field, arriving there at about 4:00 p.m.; that TK, the claimant, and the other maintenance workers arrived later on; and that he was not paid by anyone for his work loading the hay. TY, the school's assistant principal, stated in a recorded statement that his work hours during [date of injury] were from 7:00 a.m. to 4:00 p.m. and in an affidavit stated that he volunteered to help TK load hay on [date of injury], that he left the school at about 4:00 p.m. on that day to do that, and that he was not paid by the school or by TK for his work loading hay.

OB, a school maintenance worker whom TK drove to the field, testified that he volunteered to help TK load the hay on [date of injury]. He initially said that they left the school that day about 3:30 p.m. and arrived at the field with the claimant about 4:30 or 5:00 p.m., but later testified that they did not leave the school until "4 something." OB also said that he did not "clock out" when he left the school; that he did not feel that he was on "school time" when he left the school; that he did not expect to get paid by the school for loading the hay because it was not the school's hay; that he did not feel that loading the hay was part of his school job; that TK told him that the hay loading might occur after work or "maybe before then"; that TK told him he could leave work early to

help load the hay but that he would not get paid for it; and that he did not get paid for that work.

CC, a school maintenance worker whom TK drove to the field, testified that TK asked him to help load the hay; that TK, and not the school, paid him for loading the hay; that TK told him that he, TK, would "write him out" at 5:30 p.m.; that they had to leave early to go to the field because of pending rain; that they left the school at about 4:00 p.m. or 5:00 p.m; that he and the other maintenance workers, including the claimant, did not clock out when they left to go to the field; that his group with the claimant arrived at the field at about 5:00 or 5:30 p.m.; that they were not on "school time" when helping TK with the hay; and that they all had volunteered to load the hay after work, but they left early to do that work before it rained. CC signed a written statement in November 1996 which stated that he was hauling hay on [date of injury], on school time, but in an affidavit he gave in January 1997 he stated that the hay was not "bailed" on school time, that he was not required to help TK, and that he voluntarily left work early at around 4:30 p.m. on [date of injury] to help TK. In a recorded statement CC said that he was not required to help TK load the hay and estimated that he left the school on [date of injury] at 3:00 p.m. or 4:30 p.m.

The claimant testified that he had volunteered to help TK load the hay after work hours (after 5:30 p.m.) because he owed TK a favor, but that, because of rain, they left the school at about 2:30 or 2:45 p.m. on [date of injury] and that at that time he was not volunteering to help TK and he did not clock out. He said that RC called TK about 2:00 p.m. and told TK that "you all" needed to come out to the field because it was raining. RC denied making that call, but said that they all knew that rain was forecasted. The claimant testified that TK was the only person who asked him to go to the hay field. The claimant said that when he asked TK what he should do with his time, TK told him, OB, and CC to "stay on the clock" and that he, TK, would take care of it. The claimant said he assumed the school would pay him up until 5:30 p.m. on [date of injury]. He said they arrived at the field about 4:15 p.m., that he was run over by the hay trailer at about 4:45 p.m., and that he was on "school time." He said he guessed that on Monday morning [4 days after date of injury] TK wrote on the time cards that they clocked out at 4:30 p.m. on [date of injury] and also said that he did not get paid for the hour of 4:30 to 5:30 p.m. on [date of injury]. He said that TK dropped him off at the school at about 7:30 p.m. on [date of injury]. The claimant testified that [date of injury] was the first time he had done "hay hauling" on "school time."

Section 401.011(12) provides, in 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 that term includes an activity conducted on the premises of the employer or at other locations. The hearing officer found that the claimant was not in the furtherance of the affairs of the employer when he injured his left knee on [date of injury], and concluded that the claimant did not sustain an injury in the course and scope of employment. The claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). In Texas Employers' Ins. Ass'n v. Anderson, 125 S.W.2d 674, 677 (Tex. Civ. App.-Dallas 1939, writ ref'd), the court observed that whether an employee sustained an injury while in the course of his employment must be determined on the particular facts of each case and as a question of fact. The evidence in the instant case reflects that the school is not in the hay business and derived no benefit from the hay loading and hauling. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that sufficient evidence supports the hearing officer's decision and that his decision is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Without a compensable injury, the claimant would not have disability as defined by Section 401.011(16). Thus, the hearing officer did not err in determining that the claimant has not had disability.

We note that the claimant testified at the CCH that TK asked him to work in the hay field and he argued that direction by TK to work in the hay field placed him in the course and scope of employment. TK denied that he instructed the claimant to work in the hay field and RC said that TK did not require anyone to work in the hay field. The hearing officer did not make a finding regarding direction by TK or authority to make any such direction. As previously noted, the evidence is that the school is not in the hay business. Section 401.012 defines "employee" and subsection (b)(1) of that section provides that the term employee includes an employee employed in the usual course and scope of the employer's business who is directed by the employer temporarily to perform services outside the usual course and scope of the employer's business. This provision has been referred to as the "temporary direction" exception. Texas Workers' Compensation Commission Appeal No. 93142, decided April 7, 1993 (unpublished). However, the employer in the instant case, a school district, is a political subdivision. Section 504.001(3). Chapter 504 of the 1989 Act pertains to workers' compensation insurance coverage for employees of political subdivisions and the definition of "employee" in that chapter does not include the "temporary direction" exception language found in Section 401.012(b)(1), and Section 504.002(a)(1) provides that the definition of "employee" in Section 401.012 does not apply to and is not included in Chapter 504. Consequently, Section 401.012(b)(1) regarding temporary direction by

the employer to perform services outside the usual course and scope of the employer's business would not apply to this case.

The hearing officer's decision and order are affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Tommy W. Lueders
Appeals Judge