

APPEAL NO. 980002

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 12, 1997, a contested case hearing (CCH) was held. With respect to the issues before him, the hearing officer determined that respondent (claimant) was injured in the course and scope of his employment (had sustained a compensable injury) on _____ (all dates are 1997), and that claimant had disability from _____ through March 16th.

Appellant, (employer), referred to herein as the self-insured, appeals, contending that the credible evidence shows that claimant had deviated from his employment and was engaged in a personal project at the time of his injury and, therefore, was not in the course and scope of his employment. The self-insured requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging affirmance.

DECISION

Affirmed.

Although there is substantial deposition testimony which controverts some of the ancillary facts, the basic facts establish that claimant was a 15-year maintenance employee of the self-insured, and that on _____, somewhere between 9:20 a.m. and 9:40 a.m., claimant, and others, took a 10-minute break in the self-insured's "break/ facilities" area. In this area was a "planer/joiner" which the self-insured had apparently salvaged from another building it had sold. Claimant was using the planer/joiner when some wood slipped or caught, resulting in the partial amputation and injury to several fingers of claimant's left hand. The time of injury is in dispute, with most of the deposition evidence indicating that the accident occurred around 10:30 a.m. Claimant contended that it occurred some time earlier and that he was familiarizing himself with this equipment while waiting on a coworker who was on some "union business," before returning to the building where they had been working. The hearing officer made no determination on the time of injury. It is undisputed that claimant had made a birdhouse earlier that week, apparently during his break time. It is not clear whether he had used the planer/joiner for that project or not. Claimant testified at the time of the injury he was familiarizing himself with this piece of equipment, using a scrap piece of wood. The self-insured maintains that claimant was engaged in a personal project (building a bird house or squirrel feeder) after his break was over, and thereby he had deviated from his employment, making the injury noncompensable. It is undisputed that on the day of injury claimant's assigned duty was a "ceiling job" in another building. The hearing officer notes that "[t]here was some indication Claimant may have been working on a bird house."

It is undisputed that claimant was in an authorized area, that there were no rules prohibiting claimant from using the saw, that claimant was on company time and subject to

the direct control of his supervisor. The hearing officer, in the Statement of the Evidence, comments that some "[t]estimony [deposition] reflects other employees sometimes worked on personal projects using company tools." In his discussion, the hearing officer comments that the creditable evidence "reflects Claimant had not deviated from this employment, and he was not working on a personal project when injured." The hearing officer made the following appealed factual determinations:

FINDINGS OF FACT

4. The Claimant sustained an injury at work on _____, when he got his hand caught in a Planer/Joiner.
5. The Claimant was not working on a personal project at the time of injury.
6. At the time of injury Claimant was on the Employer's premises, subject to the Employer's direct control.
7. Claimant was in an authorized area when injured.
8. Claimant was injured while using company equipment.
9. Claimant had not deviated from his employment while he was using the Planer/Joiner.

The self-insured cites testimony and deposition evidence which might lead one to different inferences. First, we would note that although Finding of Fact No. 4 is appealed, the only dispute is whether the injury is compensable, not that it occurred "at work" using a "Planer/Joiner." A compensable injury is defined as an injury that arises out of and in the course and scope of employment. Section 401.011(10). Section 401.011(12) defines course and scope of employment as:

an activity of any kind and 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. The term includes an activity conducted on the premises of the employer or at other locations.

The burden is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Appeal No. 91028, decided October 23, 1991. Unless the evidence is such that only one conclusion can reasonably be drawn from it, the question of deviation from the course and scope of employment is one of fact to be determined by the hearing officer. Texas Workers' Compensation Appeal No. 91015, decided September 18, 1991. The self-insured

only points to deposition evidence that claimant's break was over, at the latest, at 9:50 a.m., that claimant remained in the break area on a personal project, and that claimant was not required to use the equipment or wood he was working with on the ceiling job in the other building.

In this case, the evidence was clearly conflicting and subject to different inferences. We have many times noted that the hearing officer is the trier of fact and the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). 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). The hearing officer's determinations that claimant was injured in the course and scope of his employment are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Since we find the evidence sufficient to support the determinations of the hearing officer concerning course and scope of employment, we will not substitute our judgment for his. Texas Workers' Compensation Appeal No. 94044, decided February 17, 1994.

The self-insured did not appeal the hearing officer's determinations on disability and, therefore, since we are affirming the hearing officer's determinations on course and scope of employment, the hearing officer's determinations on disability have become final.

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge