APPEAL NO. 000166

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 December 6, 1999. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and that he had disability from August 20, 1999, to December 6, 1999. Appellant (carrier) appeals, contending that claimant was not in the course and scope of his employment when he fell from the fence, sustaining an injury. Claimant responds that he was furthering the employer's affairs at the time of the fall and that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant was in the course and scope of employment and was furthering employer's affairs at the time of his injury. The hearing officer set forth the background facts in his decision and order. Briefly, claimant worked as a cashier at a convenience store/gas station. Claimant sustained severe injuries at 2 a.m. on _____, when he fell from a fence while trimming trees that hung over the fence and extended over the premises of the store. Claimant's duties included clearing the outside premises of trash and "weed eating" around the property. The store manager said tree trimming was not one of claimant's job duties and that if she had seen him doing this, she would have stopped him.

In Section 401.011(12) of the 1989 Act, "course and scope of employment" is defined to mean "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." *See. e.g.,* Deatherage v. International Insurance Company, 615 S.W.2d 181, (Tex. 1981) and Texas Employers' Insurance Association v. Prasek, 569 S.W.2d 545 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.). The court in Lumberman's Reciprocal Ass'n. v. Behnken, 112 Tex. 103, 246 S.W. 72 (1922) stated the following:

> An injury has to do with, and arises out of, the work or business of the employer, when it results from a risk or hazard which is necessarily or ordinarily or reasonably inherent in or incident to the conduct of such work or business. As tersely put by the Supreme Court of Iowa: "What the law intends is to protect the employee against the risk or hazard taken in order to perform the master's task."

As noted in 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 31.00 (1990):

> 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 the method of accomplishing the ultimate work, the act remains within the course of employment.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Whether an activity arises out of and originates in employment is a fact question. Texas Workers' Compensation Commission Appeal No. 961698, decided October 19, 1996; Fidelity & Guaranty Insurance Underwriters, Inc. v. LaRochelle, 587 S.W.2d 493 (Tex. Civ. App.-Dallas 1979, writ dism'd). In this case, there was evidence that the manager had asked claimant to do yardwork duties, which were not listed on the duty list for cashiers posted on the premises. Claimant's duties included keeping the surrounding premises free of debris and weeds. Claimant's mother testified that claimant told her that the truckers were glad that claimant had been trimming the trees because then their trucks did not hit the tree limbs. She further testified that claimant said the manager's husband was going to get claimant equipment to cut the trees.

The manager's husband, who had been a cashier in the past, said he had sharpened an ax for claimant and brought it to claimant. He said he watched claimant as he was cutting the trees. He said that, although he had never trimmed trees when he had been a cashier, he did not question claimant's activity and that he did not think claimant was doing anything out of the ordinary. The hearing officer could have found that cutting the trees furthered employer's business because the branches of the trees would not scrape on trucks on the premises for business purposes. The hearing officer could consider the conflicting evidence and find that claimant was attempting to prevent scrapes on the trucks owned by customers. The hearing officer could determine that claimant was not pursuing his own personal objectives. There is evidence to support a determination that the act of trimming the trees was not so wholly foreign to claimant's job duties that it was a deviation from the course and scope of employment. *See* Texas Workers' Compensation Commission Appeal No. 91126, decided February 28, 1992.

Carrier's contention that there is no evidence to support the disability determination is without merit because the attorney for carrier stated at the CCH that he was willing to stipulate that claimant had disability "to the present."

We affirm the hearing officer's decision and order.

Judy Stephens
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge