APPEAL NO. 001718

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 June 21, 2000. The hearing officer determined that the appellant's (claimant) horseplay was the producing cause of his claimed injury; that the respondent (carrier) is relieved of liability for compensation; that the claimant's injury was not a result of his willful intention to injure another party; that the claimant sustained an injury only to his forehead on _____, at work; and that the claimant did not have disability.

The claimant appealed and argued that he was not engaged in horseplay and that his injuries were more extensive than just a forehead injury found by the hearing officer. He argues that he cannot work due to the injuries. The carrier responded that the hearing officer's fact findings should not be set aside by the Appeals Panel. There was no appeal of the hearing officer's finding that the claimant was not hurt due to his willful intention to injure another person.

DECISION

Affirmed.

The claimant was employed in the manufacture of tires by (employer). He worked on an assembly line where the tires were hung on hooks that appear, from pictures in evidence, to be bars bent at a 90E angle. One hook goes through the middle of each tire, and they are hung on an overhead conveyor of sorts which requires them to be manually moved from area to area as the stages of manufacture are performed. The "elbow" of this angle protrudes from the hole in the tire.

The claimant was injured on _____, when he was struck by this protruding angle in the forehead. Although the extent of his injuries was in issue, the basic event was not; the person who pushed the tires at the claimant, Mr. C, admitted that he did so with the intent of striking, but not of hurting, the claimant. He characterized the force of the contact, not the contact itself, as "accidental."

The events leading up to this were in dispute. The claimant maintained that he did nothing prior to this incident, and while he may have kicked some boxes that morning, they were boxes in the way of his workstation. He characterized being struck by the tires as an accident. The claimant was working in the same general area with Mr. C, who he said was his supervisor. Mr. C said that he had been promoted a few days before to "lead" man.

According to Mr. C, the claimant had come into his area first thing that morning, kicking boxes in his own area and saying he needed some "g. d." tires in order to begin work. Mr. C agreed that the claimant's function required tires coming from his area. Mr. C said that he responded "Man, just leave me alone," and characterized this interchange as customary "horseplay."

Mr. C provided a sketch of the work area and showed where the claimant was with respect to where he was. According to Mr. C, the claimant bumped him with tires that he was manually pulling to his area, as he turned a corner created by the rack. Mr. C said he complained each time this happened. However, Mr. C said that he did not think "until the third time" that this action was intentional on the claimant's part, and he agreed that the claimant would have had to push tires hanging in this area back in order to move his tires to his part of the work area. When pressed as to why Mr. C concluded that the third occasion was "horseplay," Mr. C pointed to two things: that the claimant had been "horse playing" earlier when he came and kicked boxes around, and that after this third time, when he complained to the claimant about crowding his area, the claimant laughed and said "I need some tires, man." At this point, Mr. C intentionally shoved the tires toward the claimant. Mr. C said that when he was jostled these three times by the tires that the claimant had bumped, the claimant made no comment while doing so.

After this, Mr. C agreed that words were exchanged and he told the claimant that they would settle this "in the bathroom." Another witness, Mr. G, testified as to the conversation in the bathroom. He did not see the accident, but saw the claimant holding his forehead, and he followed the claimant and Mr. C into the bathroom. He heard Mr. C say, "What do you want to do?" and the claimant said, "You're my supervisor, I don't want to fight you." Thereafter, the claimant and Mr. C went to a higher-level supervisor. Mr. G acknowledged that he had been terminated.

In the claimant's report of the injury, the claimant made reference to a racial statement that Mr. C made a few weeks earlier, and also stated he had been threatened with a gun the day of the injury. Mr. C denied making the racial statement, saying that it would be foolish to do so because "I'm the minority there." However, he agreed making the gun statement in the heat of "anger." It was Mr. C who said he told his supervisor that he and the claimant had been fooling around. Mr. C said he was reprimanded for horseplay in the incident. Mr. C had said that upon his promotion, he had cautioned workers in his area about not engaging in horseplay.

The claimant contended he hurt his eye, his neck, and his forehead. He had not worked since the day of the accident. The claimant was asked by the hearing officer to say what physical conditions still bothered him and he only responded that he had headaches and mental distress resulting in an inability to sleep. It was not until further questioning that he also stated he had neck problems, but the relationship to the ability to work was not specified. Since the accident, the claimant had watched his minor children while his wife worked. He agreed that he had been released back to work when he first sought treatment, with no restrictions, but subjectively felt he could not work. The claimant agreed he was involved in a motor vehicle accident on September 9, 1999, in which his car was sideswiped and he was injured, although he stated only his hips and lower back were affected.

A carrier has the burden of proving exceptions to compensability of work-related injuries that are set out in Section 406.032. Section 406.032(2) provides that the carrier is not liable if "the employee's horseplay was a producing cause of the injury." The theory

behind the horseplay exception to liability under the 1989 Act and its predecessor statute is that if an employee willingly engages in an act of horseplay which results in injury to the employee, then the horseplay is a deviation from the employee's course of employment. *See* Calhoun v. Hill, 607 S.W.2d 951 (Tex. Civ. App.-Eastland 1980, no writ), and cases cited therein. The evidence must show an unbroken chain of events leading to the injury. The case of United General Insurance Exchange v. Brown, 628 S.W.2d 505 (Tex. App.-Amarillo 1982, no writ) concerned an employee, later deceased, who clearly was engaged in incidents of horseplay (such as throwing water) directed at the coworker who was driving the pick-up truck in which the employee was riding in the back. However, the court found evidence to support a finding that the horseplay had ceased at the time the employee fell from the back of the truck and was fatally injured. We have held that horseplay turns on factual determinations. *See* Texas Workers' Compensation Commission Appeal No. 93013, decided February 16, 1993; Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991. The hearing officer in this case evidently believed, although different inferences could be drawn, that the claimant was intending to bump the tires and that this was a producing cause of the incident leading to his injury.

We also affirm the hearing officer's determination as to the extent of the claimant's injury and the lack of disability. She could choose to disbelieve the doctor's records or the claimant's testimony as to how extensive the claimant's injury was and could believe that more extensive problems were more likely related to the motor vehicle accident. The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this was the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Alan C. Ernst
Appeals Judge