APPEAL NO. 002191

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 August 2, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) was involved in horseplay when he sustained an injury, that the respondent (carrier) is relieved of liability, and that the claimant did not have disability. The parties had agreed on the disability if the injury were found compensable.

The claimant appealed, contending that he had been ordered to undertake the activity which resulted in his injury and that the supervisor had prolonged the activity. The claimant contends that the facts of the case do not meet the legal definition of "horseplay." The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The carrier responds, urging affirmance.

DECISION

Affirmed.

The facts are largely undisputed. The claimant was employed as a "copy operator" making duplicate copies of various documents. The claimant worked from 3:00 p.m. to 11:00 p.m. There were eight employees working in the section, including a supervisor. Apparently a "lunch" break was included and one of the employees would go out and bring lunch back for the other employees. On _____, two of the claimant's coworkers, Jr and Je, who were brothers, were arguing about who would go out to bring back lunch for some of the other employees. (The claimant had brought his own lunch because of a digestive condition.) Initially, Jr and Je were going to arm wrestle to see who would go out but apparently Jr was larger than Je and the supervisor suggested that whoever beat the claimant would go out to get lunch for the others. The claimant willingly accepted the challenge and arm wrestled both Jr and Je. The claimant admitted that he was not required to arm wrestle the brothers and that there would be no consequences if he chose not to do so. The claimant said he did not feel pressure to do what the supervisor suggested and when asked why he did not say no, the claimant responded that he did not "want to wuss out." After wrestling the brothers right-handed, the supervisor suggested that the claimant arm wrestle the brothers left-handed. The claimant said that in wrestling Je left-handed, a second time, "we were both putting everything into it" when the claimant's arm snapped.

It is undisputed that the claimant sustained a fracture of the left humerus with radial nerve involvement and that surgery with the insertion of a metal plate and screws was required.

The hearing officer, in the Statement of the Evidence, recites:

> The Claimant's position was that when the injury occurred (on _____) he was in course and scope of his employment and furthering the affairs of the Employer. Claimant alleged that he did not engage in horseplay and participated in the arm wrestling match at this [sic] supervisor's suggestion.

The carrier defended on the basis that the claimant was engaged in horseplay under the exceptions in Section 406.032.

A compensable injury is one that occurs in the course and scope of employment. Section 401.011(16). Section 406.032(2) provides that a carrier is not liable for compensation if "the employee's horseplay was a producing cause of the injury." In Texas Workers' Compensation Commission Appeal No. 982250, decided November 5, 1998 (Unpublished), we applied the dictionary definition of horseplay as "rough or boisterous play." The defense of horseplay only applies if the injured employee voluntarily participated in the horseplay and the horseplay was a producing cause of the injury. Texas Workers' Compensation Commission Appeal No. 971594, decided September 26, 1997. Whether an employee voluntarily engaged in horseplay and whether the horseplay was a producing cause of an injury present questions of fact for the hearing officer to decide. Appeal No. 971594. In Texas Workers' Compensation Commission Appeal No. 982732, decided January 6, 1999 (Unpublished), we considered a number of horseplay decisions and noted that neither the 1989 Act nor Texas Workers' Compensation Commission rules define horseplay.

The issues of injury in the course and scope of employment and disability presented questions of fact for the hearing officer to determine from the evidence presented. We cannot conclude, as the claimant contends, that the hearing officer erred as a matter of law in determining that the claimant was injured when he willingly and voluntarily participated in the arm wrestling horseplay.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCUR IN THE RESULT:

I concur in the result. The evidence is sufficient to affirm the determination that the claimant was not injured in the course and scope of his employment.

Tommy W. Lueders
Appeals Judge