APPEAL NO. 002908

Following a contested case hearing, commenced on August 16, 2000, with a second session held on November 8, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issue by determining that the respondent (claimant) sustained a compensable injury to his right foot on _____, while in the course and scope of his employment. The appellant (carrier) files a request for review arguing that the claimant's actions constituted a deviation from the course and scope of employment and that the hearing officer erred in not permitting the carrier to add the issue of horseplay. The claimant responds that the hearing officer correctly found that the claimant was injured in the course and scope of his employment and did not abuse her discretion by not permitting the carrier to add an issue as to horseplay.

DECISION

Finding sufficient evidence to support the decision of the hearing officer, and no reversible error in the record, we affirm the decision and order of the hearing officer.

The hearing officer summarizes the facts of the case in her decision and we adopt her rendition of the facts. It was undisputed that the claimant was injured at work on _____, when a vending machine in his employer's breakroom fell on his foot. The claimant testified that the vending machine fell forward when he shook it because it had failed to dispense a snack to him. The carrier brought forth evidence concerning the weight and the stability of the vending machine arguing that it could not have fallen unless the claimant used excessive force to cause it to tip over. The carrier argues that the use of such force, which it characterizes as vandalism, constituted a deviation from the claimant's course and scope of employment.

The carrier's argument presupposes that the claimant used excessive force causing the vending machine to tip over. The hearing officer obviously believed the claimant's testimony that he merely shook the machine. While the carrier argues that the evidence of the weight of the machine and its stability disproves the claimant's testimony, this evidence merely creates a conflict in the evidence for the hearing officer to resolve. 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 and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

As far as the hearing officer's refusal to add an issue of horseplay, we do not find that she abused her discretion. The hearing officer found that the carrier did not timely request a separate issue as to horseplay. While the carrier disputes this, we cannot say that the hearing officer did not follow any guiding principles in refusing to add the issue.

In any case, any error in not adding the issue would be harmless as the carrier's theory that the claimant deviated from the course and scope of his employment by intentionally vandalizing the vending machine is, under the facts of this case, distinguishable from the horseplay defense only as a matter semantics. The hearing officer's rejection of the carrier's theory that the claimant intentionally vandalized the vending machine and her acceptance of the claimant's version of events would clearly be inconsistent with a finding of horseplay.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge