

APPEAL NO. 020442
FILED APRIL 1, 2002

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 February 8, 2002. The hearing officer determined that (1) the respondent/cross-appellant (carrier) is not relieved from liability for the injury of _____, based on the defense of horseplay; (2) the carrier is relieved of liability for benefits in this case because the appellant/cross-respondent (claimant), without good cause or other legal excuse, failed to timely file a claim for compensation for the injury of _____; (3) the carrier is not relieved of liability in this case, based on an election by the claimant to receive benefits under a private policy of health insurance; and (4) because the injury of _____, is not compensable, the claimant did not have disability. The claimant appeals the good cause determination on sufficiency grounds. The carrier urges affirmance of the hearing officer's good cause determination but appeals the remaining issues on sufficiency grounds. There is no response in the appeal file from the claimant to the carrier's cross-appeal.

DECISION

Affirmed.

HORSEPLAY

The hearing officer did not err in determining that the carrier is not relieved from liability for the injury of _____, based on the defense of horseplay. The theory behind the horseplay exception to liability under the 1989 Act and its predecessor statute is that willful engagement in an act of horseplay is a deviation from the employee's course of employment. See Section 406.032(2); Calhoun v. Hill, 607 S.W.2d 951 (Tex. Civ. App.-Eastland 1980, no writ), and cases cited therein. We have said 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. In view of the evidence presented, the hearing officer could find, as he did, that the claimant's activities at the time of injury did not constitute horseplay and were not a deviation from the course and scope of the claimant's employment. The hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

GOOD CAUSE

The hearing officer did not err in determining that the carrier is relieved of liability for benefits in this case because the claimant, without good cause or other legal excuse, failed to timely file a claim for compensation for the injury of _____. We have held that

the appropriate test for the existence of good cause is whether the claimant acted as a reasonably prudent person would have acted under the circumstances. Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994, citing Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). Under the circumstances of this case, we cannot conclude that the hearing officer abused his discretion in determining that the claimant did not have good cause for failing to timely file a claim for compensation with the Texas Workers' Compensation Commission.

ELECTION OF REMEDIES

The hearing officer did not err in determining that the carrier is not relieved of liability in this case, based on an election by the claimant to receive benefits under a private policy of health insurance. The Court of Appeals for the Fifth District of Texas at Dallas in Valley Forge Insurance Company v. Austin, Tex. App.-Dallas No. 05-00-01915-CV, opinion issued December 20, 2001, held that the common-law election of remedies doctrine is no longer a viable affirmative defense to the pursuit of a workers' compensation claim. See also Texas Workers' Compensation Commission Appeal No. 012964, decided January 14, 2001, citing the Austin case. Additionally, the hearing officer's determination that the claimant did not make an informed election to receive health insurance benefits in lieu of workers' compensation benefits is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

DISABILITY

The hearing officer did not err in determining that the claimant did not have disability. The 1989 Act requires the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16). Because the claimant's injury is not compensable, the hearing officer properly concluded that the claimant did not have disability.

The decision and order of the hearing officer are affirmed.

The true corporate name of the carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**C.T. CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Edward Vilano
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge