APPEAL NO. 020783
FILED MAY 15, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on February 27, 2002, the hearing officer resolved the two disputed issues before her, namely, the injury in the course and scope of employment and horseplay, the latter an exception to the liability of the respondent (carrier). The hearing officer found that the appellant (claimant) did not sustain damage or harm to the physical structure of his body while furthering the employer's business on or about_____, and concluded that the claimant was not injured in the course and scope of his employment with the employer on or about_____. The hearing officer further found that, at the time the claimant sustained the injury made the basis of this case, he was an active participant in horseplay, which constituted a producing cause of such injury, and concluded that his horseplay constituted a producing cause of his injury of approximately_____. The claimant's request for review is essentially a challenge to the sufficiency of the evidence and focuses on the credibility of the carrier's witnesses. The claimant complains of the hearing officer's "continually pressuring me to move on" and further complains of a denial of his request to subpoena three witnesses. In its response, the carrier urges the sufficiency of the evidence to support the challenged factual determinations and the lack of reversible error in the other assigned errors.

DECISION

Affirmed in part; reversed and rendered in part.

The claimant testified that on or about_____, while working as a contractor quality control manager for the employer, a company owned by his parents, and supervising a subcontractor's work on a levee, his right leg was injured from the knee down when, while riding a three-wheel all terrain vehicle (ATV) on the levee, he put his right foot down to keep from tipping over and the right wheel ran over his right foot, ankle, and calf. The carrier adduced evidence from the subcontractor that the claimant did not have permission to use the ATV, that he was seen during the approximate period of the claimed accident jumping the ATV over dirt piles, and that his leg showed no indication of injury immediately after the claimed accident. The claimant acknowledged that his father terminated his employment shortly after the claimed accident for cause. The claimant, who characterized his injury as "minor," adduced evidence that he sought medical treatment on November 26, 2001, and was diagnosed with a contusion. The carrier contended that this is a "spite claim," given the circumstances of the claimant's job termination and his stated intention to "seek justice under the Whistle Blowing Act" for his being "unfairly terminated."

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Gaza v. Commercial Insurance Company of Newark, New Jersey, 508

S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). With respect to the finding that the claimant did not sustain damage or harm to the physical structure of his body while furthering the employer's business on or about_____, we are satisfied that this finding is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and that the finding sufficiently supports the conclusion that the claimant did not sustain an injury in the course and scope of his employment with the employer on or about_____.

As for the issue of horseplay, Section 406.032(2) provides that an insurance 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. 91029, decided October 25 1991, a case involving the horseplay exception to liability, the Appeals Panel stated as follows:

> Each exception, including horseplay, basically requires that once a carrier introduces enough evidence to raise an issue as to the exception, then the employee has the burden to prove the exception does not apply in proving the injury "arose out of and in the course and scope of employment." [Citations omitted.]

At no point in the hearing below was there any discussion of the burden of proof let alone the onus on the carrier to raise the horseplay exception by probative evidence and thereby shift the burden to the claimant to prove that he was, nonetheless, injured in the course and scope of his employment. The hearing officer states as follows in her discussion of the evidence:

> With regard to the allegation of horseplay, the Hearing Officer notes that although there is little, if any, direct evidence that horseplay occurred, the mechanism of injury which Claimant described is extremely difficult to envision as having occurred pursuant to the normal use of an ATV, a fact which causes the Hearing Officer to believe that the injury made the basis of this case occurred in some manner other than the manner to which Claimant testified.

We view these comments as constituting an implied finding that the carrier did not raise the horseplay exception to its liability with sufficient probative evidence so as to shift the burden to the claimant to prove, in effect, that he was nevertheless injured in the course and scope of employment notwithstanding the evidence of horseplay. Consequently, the horseplay exception to liability was not raised by the carrier; the burden to go forward with evidence on the absence of horseplay did not shift to the claimant; and the hearing officer's finding that at the time of the injury made the basis of this case the claimant was an active participant in horseplay, which constituted a producing cause of such injury, is so against the great weight and preponderance of the evidence as to be clearly wrong. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's determination that the claimant did not sustain an injury in the course and scope of his employment on or about_____. We reverse the hearing officer's determination of the horseplay issue and render a new decision that the claimant's horseplay did not constitute a producing cause of his claimed injury of on or about_____.

Concerning the claimant's complaints about the hearing officer's pressuring him to "move on," we perceive no error whatsoever. The claimant, who is not an attorney, conducted his own cross-examination of the carrier's witnesses and, in our opinion, the hearing officer allowed him extraordinary leeway in terms of repetitious and irrelevant lines of inquiry. As for the denial of subpoenas, two of the witnesses for whom the claimant said he requested subpoenas were called by the carrier and the claimant conducted cross-examination. The carrier introduced the written statement of the other witness. We perceive no abuse of discretion by the hearing officer in not issuing the subpoenas (Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986)). Even were we to have found error in the hearing officer's ruling, we would not find such error reversible since it would not have likely resulted in the rendition of an erroneous decision (Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ)).

The true corporate name of the insurance carrier is **COMMERCE & INDUSTRY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750
COMMODORE I
AUSTIN, TEXAS 78701.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge