APPEAL NO. 021048
FILED JUNE 11, 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 (CCH) was held on September 13, 2001. The hearing was reconvened on January 24, 2002. The hearing officer held that the claimant had not sustained a compensable injury and did not have disability. He found that the claimant was injured through horseplay, that he was outside the course and scope of employment at the time of the accident, that he did not have the normal use of his mental or physical faculties at the time, and that the carrier did not waive the right to dispute compensability of the claimed injury. He held that the claimant's claim for compensation was not untimely due to tolling.

DECISION

We affirm the hearing officer's decision on all appealed issues.

The hearing officer did not err in any of his determinations concerning the compensability of the claimant's contended injury or whether a dispute was waived by the respondent (carrier). We observe that although several of the carrier's exhibits are listed in the decision as "not offered," perhaps due to the cover sheet on those exhibits by the former hearing officer, they were in fact all offered and admitted at the very end of the September 13, 2001, CCH session. We have considered all of these exhibits in our review of the decision.

COURSE AND SCOPE

A fact question was raised as to whether the claimant's automobile accident happened on a personal social occasion, or in connection with an unauthorized use of an employer's demonstrator vehicle, or while showing a demo car to a prospective customer. The resolution of any conflicts against a work-related occurrence is amply supported by the record here. Moreover, even if the hearing officer had believed that a "test drive" was going on, driving so greatly in excess of the speed limit as demonstrated in this record on rainy pavement constituted a profound overstepping of the boundaries of basic safety considerations such that a deviation from the course and scope of employment could be found to have occurred. *See* Texas Workers' Compensation Commission Appeal No. 93013, decided February 16, 1993. We cannot agree with the claimant's assertion that such speed is justified to appeal to youthful prospective buyers and therefore furthers the business of the employer.

INTOXICATION AND HORSEPLAY

The claimant admitted to having two alcoholic drinks in a mixture in a 32 oz. tumbler. Valium and alcohol were found in his system on objective testing. There was conflicting evidence as to whether he had the normal use of his mental or physical faculties at the party preceding the accident. The carrier's expert extrapolated the claimant's blood alcohol level to determine whether it was within the legal limits at the time of the accident.

A trier of fact may apply the "normal use" prong of the intoxication statute, Section 401.013(2)(A), in cases where the blood alcohol content does not reach the presumptive level of intoxication set out in Section 401.013(1). *See* Texas Workers' Compensation Commission Appeal No. 982483, decided November 30, 1998. Analysis of whether there has been a deviation from the course and scope of employment may be considered when an injury occurred because of one's own horseplay. United General Insurance Exchange v. Brown, 628 S.W.2d 505 (Tex. App.-Amarillo 1982, no writ). Once more, the evidence amply supports the inferences and conclusions drawn by the hearing officer. The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would lend itself to different inferences. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

WAIVER

The claimant actually filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on June 14, 2000; the carrier responded on June 28, 2000, with a dispute, in which it also stated that it first received written notice of injury on June 21. Although the claimant argues that a February 28, 2000, settlement agreement in a wrongful death action should have constituted written notice of injury to the carrier, that agreement did not identify injuries to the claimant; the injuries discussed were those to the deceased parties. Further, the settlement agreement in evidence was not signed by the carrier. Documents in the record that were developed during that litigation show that it was the employer's unvarying position that the claimant was not authorized to have the demo vehicle in the other county and was outside the scope of his employment when the accident occurred.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a)(3) (Rule 124.1(a)(3) indicates that any communication regardless of source may serve as written notice of injury if it fairly informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and information which asserts that the injury is work-related. The hearing officer did not err in not considering the settlement agreement as such notice. There were assertions, but little evidence, in support of the argument that the liability insurance company and the carrier here were one and the same.

In reviewing the record, we cannot agree that the decision on all appealed points is against the great weight and preponderance of the evidence and we affirm.

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

JOSEPH KELLEY-GRAY, PRESIDENT
6907 CAPITOL OF TEXAS HWY NORTH
AUSTIN, TEXAS 78755.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Roy L. Warren
Appeals Judge