APPEAL NO. 033118
FILED JANUARY 15, 2004

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 October 29, 2003. The hearing officer determined that the respondent (claimant) sustained a compensable (right ankle) injury on _____, and that the claimant had disability from March 14 through July 21, 2003.

The appellant (carrier) appealed, contending that the claimant was not in the course and scope of his employment or had deviated from the course and scope of employment at the time of his injury and that he had not sustained his burden of proving exactly what he was doing to further the employer's business at the time of his injury. The claimant responds, urging affirmance.

DECISION

Affirmed.

The basic background facts are not much in dispute. The claimant, a welder, while on the morning break on _____, was exiting the employer's safety trailer when he twisted his right ankle stepping on a pallet (used as a step) and eventually was found to have fractured his right ankle. The gist of the dispute was, what was the claimant doing at the time he injured his ankle. The claimant testified that he went to the trailer to get a drill, but the hearing officer does not find that testimony credible. The carrier contends that the claimant had gone to the trailer to get (steal or otherwise convert) an electrical box to be used as a toolbox. The preponderance of the evidence was that the box was found laying beside the claimant when help came and that the box had not been there earlier when a safety meeting had taken place. The carrier contends that the claimant was stealing the toolbox. The hearing officer concluded that the claimant was carrying the box when he fell, however, as the hearing officer comments, "there is absolutely no evidence that the Claimant was headed for the parking lot to put the box in his truck, or that he was in the process of taking the box away." The evidence was that the claimant was on a break with other workers at the time of the injury, that he was on the employer's premises, and that the safety trailer was used to store tools and equipment which were used by the employees, including the claimant. The carrier contends that the claimant had failed in his burden of proof to explain to the hearing officer's satisfaction exactly what he was doing at the time of his injury.

The hearing officer commented that he did not find such clear evidence of misconduct to find a deviation from the course and scope of employment. The carrier cites Texas Workers' Compensation Commission Appeal No. 010163-s, decided March 5, 2001, in support of its position, however, that case involved a situation where the injured employee had purchased some bags of concrete from the employer for his own

personal use and was injured putting the concrete on a pallet to take to his truck. Appeal No. 010163-s, *supra*, identifies the parameters on what may, or may not, amount to a deviation from the course and scope of employment. The hearing officer, at the CCH, commented that if the claimant, in this case, had been injured putting the box in his truck, that might lead to a different conclusion. The fact was, the claimant was exiting the trailer with the box and there was no evidence (as opposed to speculation and conjecture) that the claimant was using it for his own, or an improper, purpose.

Based on the facts of this case, we decline to hold that either the hearing officer erred as a matter of law or that his decision was not supported by the evidence. The hearing officer could believe all, part, or none of the testimony of any witness including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The fact that the hearing officer did not believe that the claimant went to get a drill does not automatically mandate that the hearing officer must find against the claimant.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are 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, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

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

**ROBIN MOUNTAIN**
**6600 CAMPUS CIRCLE DRIVE EAST, SUITE 200**
**IRVING, TEXAS 75063**.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Margaret L. Turner
Appeals Judge

_____
Edward Vilano
Appeals Judge